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Supreme Court, U.S.
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No. _____

IN THE
SUPREME COURT OF THE UNITED STATES

T.G., MOTHER

Petitioner,

versus

COMMONWEALTH OF KENTUCKY, CABINET FOR HEALTH AND FAMILY SERVICES

Respondent.

On Petition For Writ Of Certiorari To The Kentucky Supreme Court

---

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether KRS 625.090 is unconstitutional on its face.

2. Whether KRS 625.090 is unconstitutional as applied in the instant case.

3. Whether the trial court had before it any evidence of "abuse or neglect."

4. Whether the finding of the trial court was supported by "clear and convincing evidence."

5. Whether the Petitioner's Due Process rights have been infringed.

IN THE SUPREME COURT OF THE UNITED STATES

October Term 2008

No._____

T.G. Mother, Petitioner,

v.

Commonwealth of Kentucky, Cabinet for Health and Family Services, Respondent

PETITION FOR A WRIT OF CERTIORARI TO THE KENTUCKY SUPREME COURT

To the Honorable, the Chief Justice and Associate Justices of the Supreme Court of the United States:

T.G., Mother, the Petitioner, prays that a Writ of Certiorari issue to review the judgment of the Kentucky Supreme Court entered in the above-entitled case on February 19, 2009.

OPINION BELOW

The judgment of the Kentucky Supreme Court was entered on February 19, 2008.

JURISDICTION

The jurisdiction of the Supreme Court is invoked under 28 U.S.C. § 1257(i).

PARTIES

T.G., Mother, Petitioner.

Commonwealth of Kentucky, Cabinet for
Health and Family Serivces, Respondents.

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STATUTE INVOLVED

K.R.S. 625.090., *see,* Appendix A.

STATEMENT OF THE CASE

Procedural history.

This action arises out of a Petition filed on or about April 8, 2005 by the Commonwealth of Kentucky, Cabinet for Health and Family Services (hereafter "the Cabinet" or "Respondent") against T.G. (hereafter "hereafter "T.G." or "Petitioner"), action # 2006-CA-001008, Jefferson Family Court, *T.G., Mother v. Commonwealth of Kentucky, Cabinet for Health and Family Services; A.J.M., an Infant* (hereafter "the Jefferson Family Court action"). Following a bench trial on December 20, 2005, the Jefferson Family Court entered an Order on March 14, 2006, finding that A.J.M. was an abused or neglected child as defined in KRS 600.020(1), and that it was in A,J.M.'s best interest that T.G.'s parental rights be involuntarily terminated.

T.G. appealed that judgment to the Kentucky Court of Appeals which, by an Opinion rendered on May 18, 2007, reversed the holding of the trial court. The Cabinet then appealed to the Kentucky Supreme Court which, on August 21, 2008 reversed the holding of the Kentucky Court of Appeals and reinstated the Order of the trial court.

Relevant facts

T.G. is the biological mother of A.J.M., born January 7, 2004. Upon her birth, the Cabinet

requested that A.J.M. be put on a 72-hour hold and filed an Emergency Custody Order (ECO) to obtain custody of her. the ECO was based upon T.G.'s diagnosis of obsessive compulsive behavior disorder and the prior removal of her two older children due to her noncompliance with treatment and her stipulations of abuse and neglect.

On August 26, 2004, the Cabinet filed for a second ECO, which was granted, and four days later filed a Juvenile Dependency, Neglect and Abuse Petition, alleging that A.J.M. was a neglected and abused child. The supporting affidavit from social worker Sky Tanghe read as follows:

> On or about July 29, 2004 CHFS reeived a report of neglect by child's NM [T.G.], indicating while NM was at a batting cage in Louisville KY she laid child on the concrete ground. During further investigation of case DCBS was advised by NM that she had 3 rental properties, one of which she would not allow social workers to enter, another home (where NM and child resided) was found to be in unsafe and unsanitary conditions. There are items stacked to the ceiling, the kitchen sink was full with dirty dished and stagnant water, the kitchen floor was cluttered with several boxes, paint can and old food. The NM signed a safety plan stating that wshe would reside at her 3rd property. The FSW observed this home and found home to be empty with a daybed (without a mattress) and a playpen. FSW has concerns that NM is not actually living

in this home. NM reports she is remodeling her other 2 properties in order to rent them to others. Child currently attends daycare at Kindercare learning center, staff has indicated concerns over NM's behavior, specifically stating there have been several times NM has brought the child into daycare with only a diaper on and has asked the teacher to dress the child. On morning of 8-18-04 NM brought child to daycare dressed. The NM was asked to fill out a form, in middle of doing so she stopped, grabbed the child and stormed outside. NM then brought the child back into daycare undressed, she asked teacher to dress child when she woke up (the child was already awake in NM's arms). Daycare indicates child appears never to be clean and her clothes are filthy. On first day NM came pick child up from daycare she did not recognize her child. The NM looked at the teacher and then at her child and then asked where her child was, she then slowly turned around and panicking asking where her child was. NM has a significant history with CPS, her oldest two chhildren are in the permanent custody of their MGM due to neglect by NM and NF. Mother has been disgnosed with obsessive compulsive disorder and elements of a paranoid personality. NM has received an assessment from Dr. Linda Bailey who believes NM would benefit from ongoing supportive and evaluative therapy as

> well as medication for her anxiety disorder. Child's NF, [Andrew M.], is not paying child support and does not have ongoing supportive contact with child. Affiant believes this child is at significant risk of neglect if left in the home with her NM.

Following the adjudicative hearing on October 6, 2004, the family court entered an order finding that the allegations in the petition were true, that A.J.M. was neglected, that reasonable efforts were made to prevent her removal from the home, and that A.J.M. was to remain in the custody of the Cabinet. Following a disposition hearing, the family court entered an order on December 8, 2004, finding that reasonable efforts were made to prevent A.J.M.'s removal from the home and that it was in her best interest for the court to take custody of her. The family court then committed A.J.M. to the Cabinet, ordered T.G. to cooperate with the Cabinet and participate in any treatment or social services program, and ordered her to pay $70 per month in child support. While the initial goal was to return A.J.M. to her mother, the Cabinet moved to change the permanency goal to adoption. To that end, the Cabinet filed a Petition for Involuntary Termination of Parental Rights on April 8, 2005, naming both T.G. and Andrew M., A.J.M.'s putative father, as respondents. The family court appointed a *guardian ad litem* to represent A.J.M.'s interests. A bench trial was held on November 1, 2005.

During the trial, the Cabinet introduced the live testimony of four witnesses. Deposition testimony from two more witnesses was filed subsequent to the trial. Dr. Sally Brenzel, a licensed

clinical psychologist who was qualified as an expert witness, performed a psychological evaluation on T.G. in 2005. As a result of her evaluation, Dr. Brenzel diagnosed T.G. with Generalized Anxiety Disorder and Borderline Personality Disorder with obsessive compulsive traits. She testified that these diseases and the symptoms associated with them are treatable, but dramatically affect T.G.'s ability to parent A.J.M. Her ability to parent was affected in that she was unable to exercise good judgment and follow through with A.J.M's basic needs or to navigate various relationships, both personal and professional. In Dr. Brenzel's opinion, improvement would be possible if T.G. could form and maintain baseline communication with the critical people in her life. Dr. Brenzel admitted on cross-examination that there had not been any report of injury to A.J.M.

Dr. Peggy Kinnetz, a mental health counselor who worked with T.G. in a parenting group, testified that T.G. completed her classes. Dr. Kinnetz observed T.G. with A.J.M. and was initially concerned about a lack of bonding, although this improved. She was noted problems with T.G.'s ability to set boundaries and to put A.J.M.'s needs above her own. Other areas of concern included T.G.'s refusal to take responsibility for previous neglect or abuse and her mistrustful and suspicious nature. Regarding her anxiety diagnosis, Dr. Kinnetz stated that the disorder would affect her ability to make good decisions and to relate to others.

T.G.'s stepmother, Nancy G., testified about the problems she encountered when she and her husband (T.G.'s father and A.J.M.'s grandfather) supervised T.G's visitation with A.J.M. for approximately two months in early 2005. While the first few visits were very good, later ones were not.

Nancy G. testified that T.G. excessively changed A.J.M.'s diapers, rearranged A.J.M.'s clothing, fed her inappropriate good, engaged in arguments in A.J.M.'s presence, kept A.J.M. up too late and left her on the floor during a shower.

Social worker Sky Tanghe was the last witness who testified for the Cabinet live at trial. She testified that she had been working with the family since 1996, when the first abuse allegation arose. Her first contact with A.J.M. was right after her birth, when the ECO was filed. Tanghe reopened the case on July 30, 2004, when she received a report of neglect. The report was that T.G. left A.J.M. on the concrete ground while she engaged in batting practice. An assessment team went to T.G.'s home and found the residence to be in deplorable condition. An ECO was entered and A.J.M. was removed. The record of the dependency action was admitted without objection. Tanghe also testified about the services the Cabinet provided to T.G., including putting a HELP team in place, providing parenting classes, scheduling evaluations, and providing therapy. She noted that while T.G. had attended her appointments, she had not completed all of the services recommended for her. Tanghe could not identify any improvement related to T.G.'s mental health issues, as she could not establish a relationship with a therapist. While Tanghe stated that T.G.'s support payments were not consistent, she would bring food, toys, and clothes during visitations. A.J.M.'s physical health was good at the time of the removal. At the time of trial, A.J.M. was medically in great shape and was above average in intelligence and development. Tanghe indicated that her foster home wanted to adopt A.J.M., and that her foster mother has a strong relationship with A.J.M.'s

maternal grandparents, so that contact would be kept up with the family after the adoption. Finally, Tanghe testified that there was nothing more the Cabinet could do to address T.G.'s mental health or to effect a successful reunification because T.G. would not take advantage of the services offered to her or stick with anything.

The Cabinet also relied upon the deposition testimony of clinical psychologist Dr. Patricia Aulbach and mental health counselor Dr. Daya Singh Sandhu. Dr. Aulbach started a therapeutic relationship with T.G. in mid-2005 regarding her mental issues on the recommendation of Dr. Kinnetz. T.G.s' initial diagnosis was Generalized Anxiety Disorder and Paranoid Personality Disorder. Dr. Aulbach noted that T.G. was very anxious during the sessions, due to her concerns about the Cabinet, and they were unable to develop a therapeutic relationship. At the end of their relationship, Dr. Aulbach gave T.G. a poor prognosis, unless she was willing to develop a relationship with a therapist and work on her issues. Dr. Singh met with T.G. three or four times. He was unable to formulate an opinion regarding T.G.'s ability to parent as he did not have enough contact with her. Dr. Singh did testify that T.G. worried that is she received psychiatric treatment, it would negatively affect her case.

T.G. relied upon the testimony of licensed certified social worker and marriage counselor Alison Johnson. She and T.G. first met in late 2004, and resumed their sessions in late 2005. In these sessions, they addressed T.G.'s anxiety over her children. During the later visits, Johnson noted that T.G. was more balanced emotionally and was learning to be a better parent with a greater willingness to listen. She testified that a long-term

therapeutic relationship depended on T.G., and that she felt connected so far. Johnson also stated that other groups, both in and out of the home, would be beneficial to T.G. She admitted on cross-examination that she had not reviewed other records, but was aware of T.G.'s diagnosis and that she was taking an antianxiety medication. Although she could not recommend that A.J.M. be returned home at that time, Johnson recommended a structured transition.

T.G. also relied upon the testimony of Betty Scharfenberger, who participated in group therapy sessions with her at Recovery, Inc. Betty testified that T.G. got better and calmer over time and had improved due to the program.

Finally, T.G. testified as to the issues raised in the proceeding. She testified that she has a degree in advertising and marketing, and currently rents properties. Regarding the state of her residence when A.J.M. was removed, T.G. explained that she was remodeling the unit, and that any problems were either accidental or unavoidable (i.e., the clogged sink). At the time of the trial, the unit was clean. Regarding the batting cage incident, T.G. testified that she did not intend to be neglectful, as she had placed A.J.M. on a blanket and kept her eye on her. She testified that she was under considerable pressure from the Cabinet to be perfect. She also was able to dispute or explain Nancy G.'s testimony regarding the incidents from their visitations. T.G. indicated that she wished to continue her sessions with Alison Johnson, as they had a good therapeutic relationship. She also pointed out that she engaged in regular visitation with A.J.M., had been paying child support, and had completed her parenting classes. She believed that she could care for A.J.M. and that she should be returned to her.

On March 16, 2006, the family court entered its Findings of Fact, Conclusions of Law as well as the Order Terminating Parental Rights and Order of Judgment. In the order, the family court made the following findings:

1. The child, [A.J.M.], is an abused and neglected child as defined in KRS 600.020.

2. The Respondent mother, for a period of not less than six (6) moths, has continuously or repeatedly failed or refused to provide or has been substantially incapable of providing essential parental care and protection for the child and there is no reasonable expectation of improvement in the parental care and protection, considering the age of the child.

3. The Respondent mother, for reasons other than poverty alone, has continuously or repeatedly failed to provide or is incapable of providing essential food, clothing, shelter, medical care or education reasonably necessary and available for the child's well being and there is no reasonable expectation of significant improvement in the parent's conduct in the immediately foreseeable future, considering the age of the child.

4. Termination of parental rights is in the best interest of the child.

5. The Cabinet of Health and Family Services is best qualified to receive custody of the child.

The family court went on to vest the Cabinet with A.J.M.'s custody, along with the authority to place her for adoption, and made her a ward of the State. The family court later denied T.G.'s CR motion to alter, amend or vacate, or for a new trial. This appeal followed.

REASONS FOR GRANTING THE WRIT

1.KRS 625.090(1)(a)(1) is unconstitutional.

Respectfully, Petitioner insists that KRS 625.090(1)(a)(1) is unconstitutional both on its face and as applied by the trial court, because it circumvents the requirement that all facts must be found by "clear and convincing evidence," and allows the trial court to adopt findings from the dependency adjudication of "abuse and neglect", the "threshold" issue, which only requires proof under the lower "preponderance of the evidence" standard.

KRS 625.090 authorizes the termination of parental rights only after a "threshold" finding that the child is abused or neglected per KRS 625.090(1)(a)(1) and/or KRS 625.090(1)(a)(2). In a termination proceeding a trial court can find the "threshold" issues either or both by finding (1) that a previous dependency adjudication of neglect or abuse occurred, or (2) the trial court can independently make a finding of neglect or abuse in the termination trial itself

The first of these two procedures, which is expressly authorized by t6he statute, is violative of due process and of the rules of evidence, since it allows the "threshold" finding to be made satisfied merely by the submission of a certified copy of the underlying dependency adjudication, alone, without any further substantial evidence at the termination trial itself.

It is manifest that dependency adjudication findings are adduced at the lower "preponderance of evidence" standard, and that such findings, without

more, cannot provide the requisite factual support in a termination trial, where the standard is the higher "clear and convincing" standard.

As the Court will note, the trial court found both that a prior adjudication of abuse or neglect had occurred, and also that such was additionally, independently, proven in the termination trial itself.

As shown below, Petitioner contends that "abuse or neglect" was not proven in the termination trial, *i.e.,* there was no "substantial evidence" before the court in that proceeding to determine from that proceeding "abuse or neglect" or Amanda had occurred.

Assuming, *arguendo,* that "abuse and neglect" as defined in KRS 600.020(1) was *not* proven in the termination case, the issue is whether a prior adjudication of abuse or neglect, entered by certified copy of same at the termination trial, can *alone* be the evidence of the "threshold" finding prior to addressing the ten factors set forth in KRS 625.090(2).

Petitioner contends that the mere entry as an exhibit of the "certified copy of the dependency record" does not by such mechanism alone create proof by "clear and convincing evidence" of any information, findings, or facts for purposes of terminating a parent's rights. Therefore, to the extent the trial court used the certified copy of the dependency record, and the adjudication therein, to satisfy the required "threshold" finding - or other facts for which no evidence was introduced in the termination trial - Petitioner contends that the trial court violated her due process rights.

Petitioner also contends that, to the extent the statute purports to allow the "threshold" finding of abuse and neglect to be e stablished in a termination

trial by entry of a certified copy of a dependency adjudication, the statute violates the constitution and federal case law interpreting it as it allows findings made under the lower "preponderance of evidence" standard, in lieu of the required "clear and convincing evidence" standard.

Petitioner also contends that, to the extent KRS 625.090(1) allows the threshold finding of abuse and neglect to be established "from the pleadings," such is also unconstitutional as the pleadings are not evidence, and cannot be considered as such.

In a dependency adjudication under KRS 620, the burden of proof is "preponderance of evidence." K620.100(3). However, in a termination trial the burden of proof is "clear and convincing evidence"; *see,* KRS 625.090(1); *Santosky v. Kramer,* 455 U.S. 745, 769-60 (1982); *.S. v. C & M.S.*, 642 S.W.2d 589, 591 (Ky. 1982).

It is axiomatic that if "abuse and neglect" as defined by KRS 600.020(1) must be found by "clear and convincing" evidence in a termination trial, then mere entry of certified findings from a previous dependency adjudication in another case as an exhibit in the termination trial cannot *alone* meet the standard.

The trial court was simply not authorized to *adopt* information in the dependency record by virtue of the fact that such was introduced as an exhibit for purposes of satisfying KRS 625.090(1)(a)(1). Tendering a certified copy of the dependency docket as proof of a prior adjudication of abuse is one means of establishing the "threshold" burden under the statute.

But accepting the information in that document as proven by "clear and convincing evidence" *without independent proof in the termination*

trial itself, is clear error. Petitioner contends that since "abuse and neglect" was *not proven in the termination trial itself,* the only evidence from which the required "threshold" finding could have been found, is the certified copy of the dependency adjudication introduced as an exhibit in the termination trial.

Such practice constitutes a violation of due process as those findings were made under the lower standard. Moreover, to the extent the statute authorizes such use, the statute violates due process, in that it allows a court to adopt findings or information from the dependency case, which information is proven only by a preponderance of evidence, in lieu of considering evidence and making findings under the required "clear and convincing" standard.

2. There was no substantial evidence of "abuse or neglect."

In addition to finding that a child has been adjudged to be abused or neglected, a circuit court may determine, based upon clear and convincing evidence, that "the child is found to be an abused or neglected child, as defined in KRS 625.090(1)(a)2.

In the present case, the family court's finding that A.J.M. is at risk to be abused or neglected appears to be based on T.G.'s mental health problems and her history of resultant neglect or abuse or her two older children. We note that there is only cursory unsupported information in the record detailing the reason T.G.'s two older children were removed from her custody. The family court devoted a

considerable portion of its findings of fact to T.G.'s mental health diagnoses as well as her treatment and therapy, ultimately concluding that her treatment had not remedied her symptoms or improved her condition to the extent that she could safely care for A.J.M. A theme running through the reports and testimony of her treatment providers is T.G.'s inability to engage in relationships, therapeutic or otherwise. Another theme is T.G.'s inability to exercise good judgment in relation to parenting A.J.M. All providers testified that T.G.'s diagnoses and symptoms were treatable.

At the time of the hearing, T.G. had returned to a previous counselor, Alison Johnson, whom she described as "enlightening." When T.G. resumed therapy in November 2005, Johnson indicated that her emotions were more balanced, that she was handling her diagnoses much better, and that she was learning to be a better parent. Johnson also testified that although she could not recommend a return of A.J.M. to T.G. at that time, an eventual, supervised return should take place. To T.G.'s credit, there is no evidence that A.J.M. had ever been injured, either physically or emotionally, while in her care, and she was in fact in good health at the time of her removal. Based upon this evidence of record, we must conclude that there is no substantial evidence to support the family court's finding of abuse or neglect under KRS 625.090(1)(a)2.

Because there is no substantial evidence to support a finding under either subsection 1. or 2. or KRS 625.090(1)(a), and there is no allegation of criminal charges under subsection 3., the family court erred in finding that A.J.M. was abused or neglected. Thus, the first prong of the three-part test has not been met.

3. The trial court lacked "clear and convincing evidence."

The holding of the trial court is also erroneous because it was not based upon "clear and convincing evidence." The grounds upon which a finding of "abuse or neglect" may be based are set out in KRS 625.090(2). In determining whether one or more of the grounds exist, a trial court is required to consider six factors, which are set out in KRS 625.090(3).

In the present case, the family court determined that grounds existed under KRS 625.090(2)(e) and (g). In its review of the six factors, the family court found that the Cabinet rendered reasonable efforts to reunify the family. KRS 625.090(3)(c). Furthermore, the family court found that the Cabinet had met A.J.M.'s needs since removal from T.G.'s custody and the prospects for improvement of A.J.M.'s welfare was greater is parental rights were terminated as her foster family wanted to adopt her. KRS 625.090(3)(e). Finally, the family court found that the Cabinet examined T.G.'s mental health. KRS 625.090(3)(a).

While there was testimony concerning T.G.'s mental illness, the statute provides that such mental illness must "render the parent consistently unable to care for the immediate and ongoing physical or psychological needs of the child for extended periods of time[.]" KRS 625.090(3)(a). However, the family court did not conclude or find that T.G.'s mental illness rendered her unable to consistently care for A.J.M.

In addition, psychologist Dr. Brenzel testified that T.G.'s diagnoses dramatically affect her ability to parent, but are manageable, and improvement is

possible if she can form and maintain baseline relationships with the critical people in her life.

Mental health counselor Dr. Kinnetz noted the progress T.G. made during their 2004 sessions, but her mistrust and suspicions would not allow A.J.M. to be returned to her at that time. Neither of these witnesses testified that T.G.'s mental illness brought her within the scope of the statute.

As to reunification, the Cabinet did make efforts by providing parenting classes and therapy for T.G. However, T.G. completed what the Cabinet recommended, and much of what the Cabinet social worker Tanghe testified to took place prior to A.J.M.'s birth. Furthermore, the Cabinet did not offer in-home services to T.G. when social worker and counselor Alison Johnson recommended these services for a successful reunification.

In sum, there was no substantial evidence that T.G. failed or was incapable of providing essential food, clothing, shelter or medical care. This was evident through the results of A.J.M.'s medical examination and testimony that she is above-average in both her intelligence and developmental levels. For this reason, the family court erred in finding otherwise.

Since there was no substantial evidence to support the family court's finding that A.J.M. was abused or neglected, or that a ground supporting termination exists, Petitioner submits that the family court clearly abused its discretion in terminating T.G.'s parental rights to A.J.M.

CONCLUSION

As shown above, the judgment of the court below was clearly erroneous and must be reversed. This Court, therefore, should grant certiorari to the Kentucky Supreme Court and, upon hearing, remand the action to the trial court with directions that the action be reinstated on the court's docket and that the Petitioner be granted a new trial. Petitioner prays for an Order of the Court so holding.

Respectfully submitted,

_____

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625.090 Grounds for termination.

1) The Circuit Court may involuntarily terminate all parental rights of a parent of a named child, if the Circuit Court finds from the pleadings and by clear and convincing evidence that:
   a) 1. The child has been adjudged to be an abused or neglected child, as defined in KRS 600.020(1), by a court of competent jurisdiction;

      2. The child is found to be an abused or neglected child, as defined in KRS 600.020(1), by the Circuit Court in this proceeding; or
      3. The parent has been convicted of a criminal charge relating to the physical or sexual abuse or neglect of any child and that physical or sexual abuse, neglect, or emotional injury to the child named in the present termination action is likely to occur if the parental rights are not terminated; and

   b) Termination would be in the best interest of the child.
2) No termination of parental rights shall be ordered unless the Circuit Court also finds by clear and convincing evidence the existence of one (1) or more of the following grounds:
   a) That the parent has abandoned the child for a period of not less than ninety (90) days;
   b) That the parent has inflicted or allowed to be inflicted upon the child, by other than accidental means, serious physical injury;
   c) That the parent has continuously or repeatedly inflicted or allowed to be inflicted upon the

child, by other than accidental means, physical injury or emotional harm;

d) That the parent has been convicted of a felony that involved the infliction of serious physical injury to any child;

e) That the parent, for a period of not less than six (6) months, has continuously or repeatedly failed or refused to provide or has been substantially incapable of providing essential parental care and protection for the child and that there is no reasonable expectation of improvement in parental care and protection, considering the age of the child;

f) That the parent has caused or allowed the child to be sexually abused or exploited;

g) That the parent, for reasons other than poverty alone, has continuously or repeatedly failed to provide or is incapable of providing essential food, clothing, shelter, medical care, or education reasonably necessary and available for the child's well-being and that there is no reasonable expectation of significant improvement in the parent's conduct in the immediately foreseeable future, considering the age of the child;

h) That:

    1. The parent's parental rights to another child have been involuntarily terminated;
    2. The child named in the present termination action was born subsequent to or during the pendency of the previous termination; and

3. The conditions or factors which were the basis for the previous termination finding have not been corrected;

i) That the parent has been convicted in a criminal proceeding of having caused or contributed to the death of another child as a result of physical or sexual abuse or neglect; or

j) That the child has been in foster care under the responsibility of the cabinet for fifteen (15) of the most recent twenty-two (22) months preceding the filing of the petition to terminate parental rights.

3) In determining the best interest of the child and the existence of a ground for termination, the Circuit Court shall consider the following factors:

a) Mental illness as defined by KRS 202A.011(9), or mental retardation as defined by KRS 202B.010(9) of the parent as certified by a qualified mental health professional, which renders the parent consistently unable to care for the immediate and ongoing physical or psychological needs of the child for extended periods of time;

b) Acts of abuse or neglect as defined in KRS 600.020(1) toward any child in the family;

c) If the child has been placed with the cabinet, whether the cabinet has, prior to the filing of the petition made reasonable efforts as defined in KRS 620.020 to reunite the child with the parents unless one or more of the circumstances enumerated in KRS 610.127 for not requiring reasonable efforts have been substantiated in a written finding by the District Court;

d) The efforts and adjustments the parent has made in his circumstances, conduct, or conditions to make it in the child's best interest to return him to his home within a reasonable period of time, considering the age of the child;
e) The physical, emotional, and mental health of the child and the prospects for the improvement of the child's welfare if termination is ordered; and
f) The payment or the failure to pay a reasonable portion of substitute physical care and maintenance if financially able to do so.

4) If the child has been placed with the cabinet, the parent may present testimony concerning the reunification services offered by the cabinet and whether additional services would be likely to bring about lasting parental adjustment enabling a return of the child to the parent.
5) If the parent proves by a preponderance of the evidence that the child will not continue to be an abused or neglected child as defined in KRS 600.020(1) if returned to the parent the court in its discretion may determine not to terminate parental rights.
6) Upon the conclusion of proof and argument of counsel, the Circuit Court shall enter findings of fact, conclusions of law, and a decision as to each parent-respondent within thirty (30) days either:

a) Terminating the right of the parent; or
b) Dismissing the petition and stating whether the child shall be returned to the parent or shall remain in the custody of the state.

Effective: July 14, 2000

History: Amended 2000 Ky. Acts ch. 60, sec. 6, effective July 14, 2000. -- Amended 1998 Ky. Acts ch. 57, sec. 16, effective March 17, 1998. -- Amended 1994 Ky. Acts ch. 242, sec. 17, effective July 15, 1994. -- Amended 1988 Ky. Acts ch. 350, sec. 75, effective April 10, 1988. -- Created 1986 Ky. Acts ch. 423, sec. 105, effective July 1, 1987.

NO. 05AD500119T JEFFERSON CIRCUIT COURT
FAMILY DIVISION NINE (9)

IN THE INTEREST OF: **AMANDA JULIET MALLIN,**
AN INFANT

ORDER TERMINATING PARENTAL RIGHTS
AND
ORDER OF JUDGMENT

*** *** *** *** *** *** ***

This cause coming on to be heard on the petition filed by the Cabinet for Health and Family Services, Commonwealth of Kentucky, to terminate the parental rights of the mother of the infant Petitioner, Amanda Juliet Mallin, female, born on January 17, 2008, and it appearing that all necessar parties have been properly brought before the Court; the Guardian Ad Litem haviing filed a report; and, the Court having heard the evidence and found by clear and convincing evidence that:

1. The child, Amanda Juliet Mallin, is an abused and neglected child as defined in KRS 600.020.

2. The Respondent mother, for a periof of not less than six (6) months, has continuously or repeatedly failed or refused to provide or has been substantially incapable of providing essential parental care and protection for the child and there is no reasonable expectation of improvement in parental care and protection, considering the age of the child.

3. The Respondent mmother, for reasona other than poverty alone, has continuously or repeatedly

failed to provide or is incapable of providing essential food, clothing, shelter, medical care or education reasonably necessary and available for the child's well being and there is no reasonable expectation of significant improvement in the parent's conduct in the immediately foreseeable future, considering the age of the chhild.

4. Termination of parental rights is in the best interest of the child.

5. The Cabinet for Health and Family Services is best qualified to receive custody of the child.

NOW, THEREFORE, IT IS ORDERED AND ADJUDGED that the parental rights of the Respondent mother of Amanda Julie Mallin, are hereby terminated, and

IT IS FURTHER ORDERED that the Respondent mother, under oath, was questioned by this Court about possible fathers for the infant petitioner and was unable to name any persons other than those previously excluded and is thereby estopped from naming any further putative fathers for Amanda Juliet Mallin;

IT IS FURTHER ORDERED that the full care, custody and control of the infant Petitioner, Amanda Juliet Mallin, be vested in the
Cabinet for Health and Family Services, Commonwealth of Kentucky, with auithority to place said child for adoption,and,

IT IS FURTHER ORDERED that the infant Petitioner, Amanda Juliet Mallin, shall be and hereby is made a ward of the State.

This is a final judgment, there being no just cause for delay.

This the 14 day of March, 2006.

_____

JUDGE, JEFFERSON CIRCUIT COURT
FAMILY DIVISION NINE(9)

RENDERED: MAY 18, 2007; 10:00 A.M.
TO BE PUBLISHED

Commonwealth of Kentucky
Court of Appeals
NO. 2006-CA-001008-ME

T.G., MOTHER
APPELLANT

APPEAL FROM JEFFERSON FAMILY COURT
v. HONORABLE STEPHEN M. GEORGE, JUDGE
ACTION NO. 05-AD-500119

COMMONWEALTH OF KENTUCKY, CABINET FOR HEALTH AND FAMILY SERVICES; A.J.M., AN INFANT
APPELLEES

OPINION
REVERSING

** ** ** ** **

BEFORE: ACREE, KELLER, AND LAMBERT, JUDGES

KELLER, JUDGE: T.G. has appealed from the Jefferson Family Court's March 16, 2006, order terminating her parental rights to her infant daughter, A.J.M., and transferring her custody to the Cabinet for Health and Family Services with the authority to place her for adoption. Having determined that the family court abused its discretion in terminating T.G.'s parental rights, we reverse.

T.G. is the biological mother of A.J.M., born January 7, 2004. Upon her birth, the Cabinet requested that A.J.M. be put on a 72-hour hold and filed an Emergency Custody Order (ECO) to obtain custody of her. The ECO was based on T.G.'s diagnosis of obsessive compulsive disorder and the prior removal of her two older children due to her noncompliance with treatment and her stipulation of abuse and neglect. The ECO was later dismissed.

On August 26, 2004, the Cabinet filed for a second ECO, which was granted, and four days later filed a Juvenile Dependency, Neglect and Abuse Petition, alleging that A.J.M. was a neglected and abused child. The supporting affidavit from social worker Sky Tanghe read as follows:

On or about July 29, 2004 CHFS received a rep[or]t of neglect of child's NM, [T.G.], indicating while NM was at the bat[t]ing cage in Louisville KY she laid child on the concrete ground. During further investigation of case DCBS was advised by NM that she had 3 rental properties, one of which she would not allow social workers to enter, another home (where NM and child resided) was found to be in unsafe and unsanitary conditions. There are items stacked to the ceiling, the kitchen sink was full with dirty dish[es] and stagnant water, [the] kitchen floor was cluttered with several boxes, paint can and old food. The NM signed a safety plan stating that she would reside at her 3rd [property.] This FSW observed this home and found home to be empty with a daybed (without a mattress) and a playpen. FSW has concerns that NM is not actually living in this home. NM reports she is remodeling her other 2 properties in order to rent them to others. Child currently attends daycare at Kindercare learning center, staff has indicated concerns over NM's behavior, specifically stating there have been several times NM has brought the child into daycare with only a diaper

on and has asked the teacher to dress the child. On morning of 8-18-04 NM brought child to daycare, dressed. The NM was asked to fill out a form, in the middle of doing so she stopped, grabbed the child and stormed outside. NM then brought child back into daycare undressed, she asked teacher to dress child when she woke up (the child was already awake in NM's arms). Daycare indicates child appears never to be clean and her clothes are filthy. On first day NM came to pick child up from daycare she did not recognize her child. The NM looked at the teacher and then at her child and then asked where her child was, she then slowly turned around and panicked asking where her child was. NM has a significant history with CPS, her oldest two children are in the permanent custody of [t]heir MGM due to neglect by NM and NF. Mother has been diagnosed with obsessive compulsive disorder and elements of a paranoid personality. NM has received an assessment from Dr. Linda Bail[e]y who believes NM would benefit from ongoing supportive and evaluative therapy as well as medication for her anxiety disorder. Child's NF, [Andrew M.], is not paying child support and does not having ongoing supportive contact with child. Affiant believes this child is at significant risk of neglect if left in the home with her NM.

Following an adjudicative hearing on October 6, 2004, the family court entered an order finding the allegations in the petition were true, the A.J.M. was neglected, that reasonable efforts were made to prevent her removal from the home, and that A.J.M. was to remain in the custody of the Cabinet. Following a disposition hearing, the family court entered an order on December 8, 2004, finding that reasonable efforts were made to prevent A.J.M.'s removal from the home and that it was in her best interest for the court to take custody of her. The family court then committed A.J.M. to the Cabinet,

ordering T.G. to cooperate with the Cabinet and participate in any treatment or social service program, and ordered her to pay $70 per month in child support. While the initial goal was to return A.J.M. to her mother, the Cabinet moved to change the permanency goal to adoption. To that end, the Cabinet filed a Petition for Involuntary Termination of Parental Rights on April 8, 2005, naming both T.G. and Andrew M., A.J.M.'s putative father, as respondents. The family court appointed a *guardian ad litem* to represent A.J.M.'s interests. A bench trial was held on November 1, 2005.

During the trial, the Cabinet introduced the live testimony of four witnesses. Deposition testimony from two more witnesses was filed subsequent to the trial. Dr. Sally Brenzel, a licensed clinical psychologist who was qualified as an expert witness, performed a psychological evaluation on T.G. in 2005. As a result of her evaluation, Dr. Brenzel diagnosed T.G. with Generalized Anxiety Disorder and Borderline Personality Disorder with obsessive compulsive traits. She testified that these diseases and the symptoms associated with them are treatable, but dramatically affect T.G.'s ability to parent A.J.M. Her ability to parent was affected in that she was unable to exercise good judgment and follow through with A.J.M's basic needs or to navigate various relationships, both personal and professional. In Dr. Brenzel's opinion, improvement would be possible if T.G. could form and maintain baseline communication with the critical people in her life. Dr. Brenzel admitted on cross-examination that there had not been any report of injury to A.J.M.

Dr. Peggy Kinnetz, a mental health counselor who worked with T.G. in a parenting group, testified that T.G. completed her classes. Dr. Kinnetz observed T.G. with A.J.M. and was initially concerned about a lack of bonding, although this improved. She was noted problems with T.G.'s ability to set

boundaries and to put A.J.M.'s needs above her own. Other areas of concern included T.G.'s refusal to take responsibility for previous neglect or abuse and her mistrustful and suspicious nature. Regarding her anxiety diagnosis, Dr. Kinnetz stated that the disorder would affect her ability to make good decisions and to relate to others.

T.G.'s stepmother, Nancy G., testified about the problems she encountered when she and her husband (T.G.'s father and A.J.M.'s grandfather) supervised T.G's visitation with A.J.M. for approximately two months in early 2005. While the first few visits were very good, later ones were not. Nancy G. testified that T.G. excessively changed A.J.M.'s diapers, rearranged A.J.M.'s clothing, fed her inappropriate good, engaged in arguments in A.J.M.'s presence, kept A.J.M. up too late and left her on the floor during a shower.

Social worker Sky Tanghe was the last witness who testified for the Cabinet live at trial. She testified that she had been working with the family since 1996, when the first abuse allegation arose. Her first contact with A.J.M. was right after her birth, when the ECO was filed. Tanghe reopened the case on July 30, 2004, when she received a report of neglect. The report was that T.G. left A.J.M. on the concrete ground while she engaged in batting practice. An assessment team went to T.G.'s home and found the residence to be in deplorable condition. An ECO was entered and A.J.M. was removed. The record of the dependency action was admitted without objection. Tanghe also testified about the services the Cabinet provided to T.G., including putting a HELP team in place, providing parenting classes, scheduling evaluations, and providing therapy. She noted that while T.G. had attended her appointments, she had not completed all of the services recommended for her. Tanghe could not identify any improvement related to T.G.'s mental

health issues, as she could not establish a relationship with a therapist. While Tanghe stated that T.G.'s support payments were not consistent, she would bring food, toys, and clothes during visitations. A.J.M.'s physical health was good at the time of the removal. At the time of trial, A.J.M. was medically in great shape and was above average in intelligence and development. Tanghe indicated that her foster home wanted to adopt A.J.M., and that her foster mother has a strong relationship with A.J.M.'s maternal grandparents, so that contact would be kept up with the family after the adoption. Finally, Tanghe testified that there was nothing more the Cabinet could do to address T.G.'s mental health or to effect a successful reunification because T.G. would not take advantage of the services offered to her or stick with anything.

The Cabinet also relied upon the deposition testimony of clinical psychologist Dr. Patricia Aulbach and mental health counselor Dr. Daya Singh Sandhu. Dr. Aulbach started a therapeutic relationship with T.G. in mid-2005 regarding her mental issues on the recommendation of Dr. Kinnetz. T.G.s' initial diagnosis was Generalized Anxiety Disorder and Paranoid Personality Disorder. Dr. Aulbach noted that T.G. was very anxious during the sessions, due to her concerns about the Cabinet, and they were unable to develop a therapeutic relationship. At the end of their relationship, Dr. Aulbach gave T.G. a poor prognosis, unless she was willing to develop a relationship with a therapist and work on her issues. Dr. Singh met with T.G. three or four times. He was unable to formulate an opinion regarding T.G.'s ability to parent as he did not have enough contact with her. Dr. Singh did testify that T.G. worried that is she received psychiatric treatment, it would negatively affect her case.

T.G. relied upon the testimony of licensed certified social worker and marriage counselor Alison

Johnson. She and T.G. first met in late 2004, and resumed their sessions in late 2005. In these sessions, they addressed T.G.'s anxiety over her children. During the later visits, Johnson noted that T.G. was more balanced emotionally and was learning to be a better parent with a greater willingness to listen. She testified that a long-term therapeutic relationship depended on T.G., and that she felt connected so far. Johnson also stated that other groups, both in and out of the home, would be beneficial to T.G. She admitted on cross-examination that she had not reviewed other records, but was aware of T.G.'s diagnosis and that she was taking an antianxiety medication. Although she could not recommend that A.J.M. be returned home at that time, Johnson recommended a structured transition.

T.G. also relied upon the testimony of Betty Scharfenberger, who participated in group therapy sessions with her at Recovery, Inc. Betty testified that T.G. got better and calmer over time and had improved due to the program.

Finally, T.G. testified as to the issues raised in the proceeding. She testified that she has a degree in advertising and marketing, and currently rents properties. Regarding the state of her residence when A.J.M. was removed, T.G. explained that she was remodeling the unit, and that any problems were either accidental or unavoidable (i.e., the clogged sink). At the time of the trial, the unit was clean. Regarding the batting cage incident, T.G. testified that she did not intend to be neglectful, as she had placed A.J.M. on a blanket and kept her eye on her. She testified that she was under considerable pressure from the Cabinet to be perfect. She also was able to dispute or explain Nancy G.'s testimony regarding the incidents from their visitations. T.G. indicated that she wished to continue her sessions with Alison Johnson, as they had a good therapeutic relationship. She also pointed out that she engaged

in regular visitation with A.J.M., had been paying child support, and had completed her parenting classes. She believed that she could care for A.J.M. and that she should be returned to her.

On March 16, 2006, the family court entered its Findings of Fact, Conclusions of Law as well as the Order Terminating Parental Rights and Order of Judgment. In the order, the family court made the following findings:

1. The child, [A.J.M.], is an abused and neglected child as defined in KRS 600.020.

2. The Respondent mother, for a period of not less than six (6) moths, has continuously or repeatedly failed or refused to provide or has been substantially incapable of providing essential parental care and protection for the child and there is no reasonable expectation of improvement in the parental care and protection, considering the age of the child.

3. The Respondent mother, for reasons other than poverty alone, has continuously or repeatedly failed to provide or is incapable of providing essential food, clothing, shelter, medical care or education reasonably necessary and available for the child's well being and there is no reasonable expectation of significant improvement in the parent's conduct in the immediately foreseeable future, considering the age of the child.

4. Termination of parental rights is in the best interest of the child.

5. The Cabinet of Health and Family Services is best qualified to receive custody of the child.

The family court went on to vest the Cabinet with A.J.M.'s custody, along with the authority to place her for adoption, and made her a ward of the State. The family court later denied T.G.'s CR motion to alter, amend or vacate, or for a new trial. This appeal followed.

On appeal, T.G. raises several arguments. First, she attacks the constitutionality of KRS 625.090(1)(a)(1)., in that a court is permitted to adopt the findings from a dependency adjudication, which is afforded a lower standard of proof than required in a termination proceeding. Second, T.G. argues that the family court's finding of abuse or neglect was not supported by substantial evidence. Third, she asserts that the family court's findings under KRS 625.090(2) that several grounds existed were not supported by substantial evidence. In conjunction with her last argument, T.G. asserts that the family court erred in finding that the Cabinet made a reasonable effort for reunification and in considering testimony concerning her mental health, as no witness was qualified as a mental health expert.

STANDARD OF REVIEW

Our standard of review in termination of parental rights cases is set forth in *M.P.S. v. Cabinet for Human Resources,* 979 S.W.2d 114, 116-17 (Ky. App. 1998):

The trial court has a great deal of discretion in determining whether the child fits within the abused or neglected category and whether the abuse or neglects warrants termination. *Department for Human Resources v. Moore,* Ky. App., 552 S.W.2 672, 675 (1977). This Court's standard of review in a termination of parental rights action is confined to the clearly erroneous standard of CR 52.01 based upon clear and convincing evidence, and the findings of the trial court will not be disturbed unless there exists no substantial evidence in the record to support its findings. *V.S. v. Commonwealth, Cabinet for Human Resources*, Ky. App., 706 S.W.2d 420, 424 (1986).

"Clear and convincing proof does not necessarily mean uncontradicted proof. It is sufficient if there is proof of a probative and substantial nature carrying the weight of evidence sufficient to convince ordinarily prudent-minded people." *Rowland v. Holt*, 253 Ky. 718, 726, 70 S.W.2d 5, 9 (1934).

With this standard in mind, we shall address the issues T.G. has raised in her appeal.

ANALYSIS

The General Assembly provided the mechanism for the involuntary termination of parental rights in KRS 625.090. The statute creates a three-prong test, whereby the Cabinet must prove, and the circuit court must determine, that 1) the chid is abused or neglected, as previously adjudged by a court of competent jurisdiction or found to be abused on neglected in the present proceeding; 2) termination would be in the child's best interest, and 3) one of several listed grounds exists. In deciding the second and third prongs, the circuit court is required to consider several enumerated factors, as listed in KRS 625.090(3).

I. CONSTITUTIONALITY OF KRS 625.090(1)(a)1.

The first determination a circuit court must make is whether a child is, or has been adjudged to be, abused or neglected as defined in KRS 600.020(1). Specifically, the statute reads:

(1) The Circuit Court may be involuntarily terminate all parental rights of a parent of a named child, if the Circuit Court finds from the pleadings and by clear and convincing evidence that:

(a) 1. The child has been adjudged to be an abused or neglected child, as defined in KRS 600.020(1), by a court of competent jurisdiction;

2. The child is found to be an abused or neglected child, as defined in KRS 600.020(1), by the Circuit Court in this proceeding; or

3. The parent has been convicted of a criminal charge relating to the physical or sexual abuse or neglect of any child and and that physical or sexual abuse, neglect, or emotional injury to the child named in the present termination action is likely to occur if the parental rights are not terminated[.]

T.G. contends that the first option violated due process, in that ti allows a circuit court to accept information and a finding of neglect or abuse that was based upon the lower preponderance of the evidence standard, as opposed to the higher clear and convincing standard mandated in involuntary termination proceedings. The Cabinet argues that there are no constitutional implications, as the prior adjudication effectuates a rebuttable presumption that a child holds the status of abused or neglected, and this presumption is merely a threshold requirement in a review that as a sum must be based upon clear and convincing evidence. Furthermore, the Cabinet argues that the legislature is presumed to be aware of the different standards applicable to dependency and termination proceedings and must have deemed the dependency adjudications reliable by including that particular option in the first prong.

The Unites States Supreme Court elevated the standard of proof for termination proceedings in *Santosky v. Kramer*, 455 U.S. 745, 769, 102 S.Ct. 1388, 1403, 71 L.Ed.2d 599 (1982): "A majority of the States have concluded that a 'clear and convincing evidence' standard of proof strikes a fair balance between the rights of the natural parents and the State's legitimate concerns . . . We hold that such a standard adequately conveys to the fact finder the

level of subjective certainty about his factual conclusions necessary to satisfy due process." Kentucky's courts and the legislature have adopted this standard of proof for involuntary termination proceedings. KRS 625.090; *N.S. v. C. and M.S.*, 642 S.W.2d 589 (Ky. 1982); *J.E.H. v. Dept. for Human Resources,* 642 S.W.2d 600 (Ky.App. 1982). However, the dependency, neglect, and abuse statute still requires that a determination, in part, be based only upon the lower preponderance of the evidence standard. KRS 620.100(3).

We begin our analysis with the strong presumption that a statute, in this case KRS 625.090(1)(a)1., is constitutional, and we must draw all fair and reasonable inferences in favor of its validity. *Possey v. Commonwealth,* 185 S.W.3d 170, 175 (Ky. 2006); *Bess v. Bracken County Fiscal Court*, 210 S.W.3d 177 (Ky. App. 2006). Furthermore, we must presume that the legislature "is aware of the constitution, previously enacted statutes and the common law." *Lewis v. Jackson Energy Co-op Corp.*, 189 S.W.3d 87, 93 (Ky. 2005). "It is clear that we should not construe [a statute] as intending an unconstitutional result if such a construction may be avoided." *Kentucky Utilities Co. v. Jackson County Rural Elec. Co-op. Corp.*, 438 S.W.2d 788, 790 (Ky. 1968). Furthermore, we must presume that the legislature did not intend an unconstitutional result in the application of KRS 625.090(1)(a)1. *See City of Louisville v. Churchill Downs*, 267 Ky. 339, 102 S.W.2d 10 (1936). "The issue of whether a statute is unconstitutional is a question of law subject to de novo review." *Wilfong v. Commonwealth*, 175 S.W.3d 84, 91 (Ky.App. 2004).

In the case, the way T.G. suggests the family court applied this particular subsection (and the way it appears that it was actually applied) clearly does not pass constitutional muster, as it permits the court in a termination proceeding mandating a higher

standard of proof to adopt a finding from a dependency action that is based upon a lower standard of proof. We disagree with each of the Cabinet's assertions that the subsection was constitutional in the way it was applied in this case. Specifically, we disagree with the assertion that the legislature created a rebuttable presumption. Our review of the statute does not reveal any indication that the legislature intended a finding under KRS 625.090(1)(a)1. to be a rebuttable presumption. In other statutes, the legislature has clearly set forth rebuttable presumptions, unlike in this particular statute. *See* KRS 189A.010(3)(presumptions in prosecution for operating a motor vehicle under the influence); KRS 189.520(3)(presumptions in prosecution for operating a non-motor vehicle under the influence); KRS 403.213(2)(15% change in amount of child support due is rebuttably presumed to be material change in circumstance); KRS 406.021(4)(voluntarily acknowledgment of paternity creates rebuttable presumption of paternity); and KRS 406.011 (child born during marriage is presumed to be child of husband and wife).

It is the holding of this Court that the mere filing and adoption of a prior finding of neglect or abuse, especially one that is not made under a clear and convincing standard, constitutes error and would raise constitutional implications. However, in following our mandate that we must presume that a statute is constitutional and draw all fair and reasonable inferences in favor of its constitutionality, we hold that KRS 625.090(1)(a)1. may be applied in a manner that passes constitutional muster. At oral argument, T.G. argued that she should be permitted to retry the prior dependency adjudication or be entitled to a complete reversal of the termination judgment. We disagree with this part of T.G.'s argument, and hold that a circuit court may perform an independent review of the evidence submitted in

the dependency action and make its own determination of abuse or neglect based upon the elevated standard of proof. Furthermore, either party would be permitted to offer proof to establish facts that led to the lower court's findings of abuse, neglect or dependency. Therefore, we hold that KRS 625.090(1)(a)1. is constitutional, so long as it is correctly applied.

In the present case, there is absolutely no indication that the family court made any type of independent review of the evidence submitted in the dependency proceeding. It merely adopted the result of the prior adjudication when it determined that A.J.M. had been adjudged to be abused or neglected. For this reason, we hold that there is no substantial evidence to support the family court's finding under KRS 625.090(1)(a)1. that A.J.M. had been adjudged to be abused or neglected. While this would normally require us to vacate the judgment to allow the family court to perform an independent review of the dependency record, in this case it is not necessary due to our ultimate holding.

II. FINDING OF ABUSE OR NEGLECT IN THE PRESENT ACTION

In addition to finding that a child has been adjudged to be abused or neglected, a circuit court may determine, based upon clear and convincing evidence, that "the child is found to be an abused or neglected child, as defined in KRS 625.090(1)(a)2. An "abused or neglected child" is defined as follows:

(1) "Abused or neglected child" means a child whose health, or welfare is harmed or threatened with harm when his parent, guardian, or other person exercising custodial control or supervision of the child:

(a) Inflicts or allows to be inflicted upon the child physical or emotional injury as defined in this section by other than accidental means;

(b) Creates or allows to be created a risk of physical or emotional injury as defined in this section to the child by other than accidental means;

(c) Engages in a pattern of conduct that renders the parent incapable of caring for the immediate and ongoing needs of the child including, but not limited to, parental incapacity due to alcohol and other drug abused as defined by KRS 222.005;

(d) Continuously or repeatedly fails or refuses to provide essential parental care and protection for the child, considering the age of the child;

(e) Commits or allows to be committed an act of sexual abuse, sexual exploitation, or prostitution upon the child;

(f) Creates or allows to be created a risk that an act of sexual abuse, sexual exploitation, or prostitution will be committed upon the child;

(g) Abandons or exploits the child;

(h) Does not provide the child with adequate care, supervision, food, clothing, shelter, and education or medical care necessary for the child's well-being . . .; or

(i) Fails to make sufficient progress toward identified goals as set forth in the court-approved case plan to allow for the safe return of the child to the parent that results in the child remaining committed to the cabinet and remaining in foster care for fifteen (15) of the most recent twenty-two (22) months[.]

In the present case, the family court's finding that A.J.M. is at risk to be abused or neglected appears to be based on T.G.'s mental health problems and her history of resultant neglect or abuse or her two older children. We note that there is only cursory unsupported information in the record detailing the reason T.G.'s two older children were removed from her custody. The family court devoted a considerable portion of its findings of fact to T.G.'s mental health diagnoses as well as her treatment and therapy,

ultimately concluding that her treatment had not remedied her symptoms or improved her condition to the extent that she could safely care for A.J.M. A theme running through the reports and testimony of her treatment providers is T.G.'s inability to engage in relationships, therapeutic or otherwise. Another theme is T.G.'s inability to exercise good judgment in relation to parenting A.J.M. All providers testified that T.G.'s diagnoses and symptoms were treatable.

At the time of the hearing, T.G. had returned to a previous counselor, Alison Johnson, whom she described as "enlightening." When T.G. resumed therapy in November 2005, Johnson indicated that her emotions were more balanced, that she was handling her diagnoses much better, and that she was learning to be a better parent. Johnson also testified that although she could not recommend a return of A.J.M. to T.G. at that time, an eventual, supervised return should take place. To T.G.'s credit, there is no evidence that A.J.M. had ever been injured, either physically or emotionally, while in her care, and she was in fact in good health at the time of her removal. Based upon this evidence of record, we must conclude that there is no substantial evidence to support the family court's finding of abuse or neglect under KRS 625.090(1)(a)2.

Because there is no substantial evidence to support a finding under either subsection 1. or 2. or KRS 625.090(1)(a), and there is no allegation of criminal charges under subsection 3., the family court erred in finding that A.J.M. was abused or neglected. Thus, the first prong of the three-part test has not been met.

III. EXISTENCE OF GROUND IN KRS 625.090(2)

Next we will address the final prong of the three-part test, namely, whether there is clear and convincing evidence of one or more of several listed

grounds. KRS 625.090(2). The grounds listed in the statute are:

(a) That the parent has abandoned the child for a period of not less than ninety (90) days;

(b) That the parent has inflicted or allowed to be inflicted upon the child, by other than accidental means, serious physical injury;

(c) That the parent has continuously or repeatedly inflicted or allowed to be inflicted upon the child, by other than accidental means, physical injury or emotional harm;

(d) That the parent has been convicted of a felony that involved the infliction of serious physical injury to any child;

(e) That the parent, for a period of not less than six (6) months, has continuously or repeatedly failed or refused to provide or has been substantially incapable of providing essential parental care and protection for the child and that there is no reasonable expectation of improvement in parental care and protection, considering the age of the child;

(f) That the parent has caused or allowed the child to be sexually abused or exploited;

(g) That the parent, for reasons other than poverty alone, has continuously or repeatedly failed to provide or is incapable of providing essential food, clothing, shelter, medical care, or education reasonably necessary and available for the child's well-being and that there is no reasonable expectation of significant improvement in the parent's conduct in the immediately foreseeable future, considering the age of the child;

(h) That:

1. The parent's parental rights to another chid have been involuntarily terminated;

2. The child named in the present termination action was born subsequent to or during the pendency of the previous termination; and

3. The conditions or factors which were the basis for the previous termination finding have not been corrected;

(i) That the parent has been convicted in a criminal proceeding of having caused or contributed to the death of another child as a result of physical or sexual abuse or neglect; and

(j) That the child has been in foster care under the responsibility of the cabinet for fifteen (15) of the most recent twenty-two (22) months preceding the filing of the petition to terminate parental rights.

To determine whether one or more of the grounds exist, a trial court is required to consider the following factors, which are set forth in KRS 625.090(3):

(a) Mental illness as defined by KRS 202A.011(9), or mental retardation as defined by KRS 202B.010(9) of the parent as certified by a qualified mental health professional, which renders the parent consistently unable to care for the immediate and ongoing physical or psychological needs of the child for extended periods of time:

(b) Acts of abuse or neglect as defined in KRS 600.020(1) toward any child in the family;

(c) If the child has been placed with the cabinet, whether the cabinet has, prior to the filing of the petition made reasonable efforts as defined in KRS 620.020 to reunite the child with the parents unless one of more of the circumstances enumerated in KRS 610.127 for not requiring reasonable efforts have been substantiated in a written finding by the District Court;

(d) The efforts and adjustments the parent has made in his circumstances, conduct, or conditions to make it in the child's best interest to return him to his home within a reasonable period of time, considering the age of the child;

(e) The physical, emotional, and mental health of the child and the prospects for the improvement of the child's welfare if termination is ordered; and

(f) The payment or the failure to pay a reasonable portion of substitute physical care and maintenance if financially able to do so.

In the present case, the family court determined that grounds existed under KRS 625.090(2)(e) and (g). In its review of the six factors, the family court found that the Cabinet rendered reasonable efforts to reunify the family. KRS 625.090(3)(c). Furthermore, the family court found that the Cabinet had met A.J.M.'s needs since removal from T.G.'s custody and the prospects for improvement of A.J.M.'s welfare was greater is parental rights were terminated as her foster family wanted to adopt her. KRS 625.090(3)(e). Finally, the family court found that the Cabinet examined T.G.'s mental health. KRS 625.090(3)(a).

We shall first address the factors from the list of six the family court considered in determining whether any grounds existed. While there was testimony concerning T.G.'s mental illness, we note that such mental illness must "render[] the parent consistently unable to care for the immediate and ongoing physical or psychological needs of the child for extended periods of time[.]" KRS 625.090(3)(a). In her brief, T.G. focuses on the requirement that the mental illness must be certified by a qualified mental health professional, but we not address that argument, primarily because the family court did not conclude or find that T.G.'s mental illness rendered her unable to consistently care for A.J.M. In addition, we note that psychologist Dr. Brenzel testified that T.G.'s diagnoses dramatically affect her ability to parent, but are manageable, and improvement is possible if she can form and maintain baseline relationships with the critical people in her life. Mental health counselor Dr. Kinnetz noted the progess T.G. made during their 2004 sessions, but

her mistrust and suspicions would not allow A.J.M. to be returned to her at that time. Neither of these witnesses testified that T.G.'s mental illness brought her within the scope of the statute.

As to the reunification issue, the Cabinet did make efforts by providing parenting classes and therapy for T.G. However, T.G. completed what the Cabinet recommended, and much of what the Cabinet social worker Tanghe testified to took place prior to A.J.M.'s birth. Furthermore, the Cabinet did not offer in-home services to T.G. when social worker and counselor Alison Johnson recommended these services for a successful reunification.

Our review of the evidence fails to reveal any substantial evidence that T.G. failed or was incapable of providing essential food, clothing, shelter or medical care. This was evident through the results of A.J.M.'s medical examination and testimony that she is above-average in both her intelligence and developmental levels. For this reason, the family court erred in finding otherwise.

Because we have determined that no substantial evidence exists to support the family court's finding that A.J.M. was abused or neglected, or that a ground supporting termination exists, we hold that the family court clearly abused its discretion in terminating T.G.'s parental rights to A.J.M. at this time.

CONCLUSION

For the foregoing reasons, the judgment of the Jefferson Family Court terminating T.G.'s parental rights is reversed.

ALL CONCUR

BRIEFS AND ORAL ARGUMENT FOR APPELLANT:

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BRIEF AND ORAL ARGUMENT FOR APPELLEE, COMMONWEALTH OF KENTUCKY, CABINET FOR HEALTH AND FAMILY SERVICES:
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Not to be published

Supreme Court of Kentucky

2007-SC-000436-DGE
AND
2007-SC-000821-DGE

COMMONWEALTH OF KENTUCKY
CABINET FOR HEALTH AND FAMILY
SERVICES; AND A.J.M., A CHILD
APPELLANT/CROSS-APPELEE

ON REVIEW FROM COURT OF APPEALS
V. CASE NUMBER 2006-CA-001008
JEFFERSON FAMILY CIRCUIT COURT NO.
05-AD-500119

T.G., MOTHER APPELLEE/CROSS-APPELLANT

OPINION OF THE COURT BY JUSTICE ABRAMSON

REVERSING AND REINSTATING

The commonwealth of Kentucky, cabinet for Health and Family Services (the Cabinet) and A.J.M. have appealed a decision of the Court of Appeals reversing the Jefferson Family Circuit Court's termination of T.G.'s parental rights as to her daughter, A.J.M. Following a December 20, 2005

bench trial, and the submission of a subsequent deposition, the Jefferson Family Circuit Court entered and order on March 14, 2006, finding that A.J.M. was an abused or neglected child as defined in KRS 600.020(1), and that it was in A.J.M.'s best interest for T.G.'s parental rights to be involuntarily terminated. In its opinion reversing the family court's order, the Court of Appeals found no substantial evidence to support the findings that A.J.M. was abused or neglected, and no grounds for termination. Ultimately, the Court of Appeals held that the family court abused its discretion by terminating T.G.'s parental rights and awarding custody of A.J.M. to the Cabinet with authority to place her for adoption. On discretionary review to this Court, we find that the family court did not abuse its discretion in terminating T.G.'s parental rights and that the Court of Appeals erred in finding as such. Therefore, we reverse the Court of Appeals Opinion and reinstate the Jefferson Circuit Court's order terminating T.G.'s parental rights.

RELEVANT FACTS

Although A.J.M is now only fours years old, her mother, T.G., has been involved with Kentucky's Cabinet for Health and Family Services for over ten years. In 1996, following a petition filed by the Cabinet, the family court ordered the removal of T.G.'s then one-year-old son, N.M., from her care based on a pattern of domestic abuse between T.G. and N.M.'s father. In May 1997, T.G. stipulated to the neglect of her son and he was returned to her. In January 1998, the Cabinet filed a second petition with regard to both N.M. and B.M., (T.G.'s then infant daughter) alleging T.G. was non-compliant with necessary medical treatment. In March 2001, the Cabinet filed its third petition noting excessive school absences and abusive discipline. After T.G.

stipulated to neglect of both children in May 2001, the children were allowed to remain in T.G.'s care under Cabinet Supervision. Two months later, however, in July 2001, a fourth petition was filed alleging a lack of supervision and abusive discipline. The Jefferson Family Circuit Court subsequently removed N.M. and B.M. From T.G.'s care and, after finding both children to be abused or neglected, awarded permanent custody of them to their maternal grandmother in May 2002.

On January 7, 2004, T.G. gave birth to her third child, A.J.M.[1] Based on T.G.'s history of neglect, the family court granted the Cabinet's emergency Custody Order (ECO) and placed A.J.M. in the Cabinet's custody on the day of her birth. After the Jefferson County Attorney rejected the Cabinet's petition, the family court dismissed the ECO and on January 12, 2004, returned A.J.M to T.G.'s care.

Six months later, on or about July 29, 2004, the Cabinet received an allegation of neglect after a batting cage attendant reported that G.G. had placed A.J.M. on the concrete just outside of the batting cage where T.G> was practicing.[2] The Cabinet responded to this report by sending to social workers to visit T.G. at her residence in order to investigate A.J.M.'s home life. During the July 30, 2004 visit, T.G. reported that she owned three rental properties and that two of them were in the process of being remodeled. Although T.G. denied the social workers access to one of her units, she did show them the unit

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[1] A.J.M.'s alleged father was excluded by subsequent paternity testing and her biological father is unknown.

[2] During the termination of parental rights trial, T.G. testified that she had laid A.J.M. (then almost seven months old) down on a blanket on her stomach a few feet away from the door of the batting cage.

where she and A.J.M. were then living, Unit #43.[1] The social workers observed this unit to have unsafe and unsanitary conditions throughout, such as large piles of clothes, toys, and other items stacked on the couch, tables and the floor; dirty carpet that had dog feces smeared on it; half-eaten containers of food and several plates of dog food piled on the kitchen floor; stagnant, dirty water in the kitchen sink; dirty dishes piled in and around the sink; and a brownish discoloration on the kitchen counters and around the sink. When the social workers visited T.G.'s third unit, unit #57, the observed that although it only contained a daybed and a playpen, it would be appropriate housing for a mother and child. Following their visit, T.G. signed a safety plan agreeing to reside in unit #57 until her primary residence, unit #43, was improved.

Several days after this home visit, on August 6, 2004, the Cabinet created a prevention plan for T.G., which she signed. This plan set forth five terms of T.G. to follow, including cooperation with the HELP Team to address the disarray of her home; consenting to a psychological evaluation and agreeing to follow all recommendations; and continuing to reside at unit#57 until her other rental unit was clean and safe. In complying with this prevention plan, T.G. participated in a psychological evaluation by Dr. Linda Bailey on August 16, 2004. Dr. Bailey concluded that T.G. suffered from an anxiety disorder, most likely an obsessive compulsive type with evidence of paranoia, and recommended that T.G.

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[1] Although the family court's findings of fact indicate that T.G. told the social workers that unit #35 was her primary residence, the pictures submitted by the Cabinet as Exhibit #5 and T.G's own testimony confirm that the unit was referred to by the trial court as having unsafe and unsanitary conditions was actually #43. At the termination of parental rights trial, T.G. stated that she still lives in unit #43.

engage in supportive therapy and medication treatment.

On August 24, 2004, the Cabinet social worker followed up with T.G. by visiting her at the unit where she and A.J.M. had agreed to live, unit #57. Upon arriving, however, the social worker observed that T.G. was paranoid and disoriented. Furthermore, other then a daybed, playpen, and some clothes piled on the floor, the unit was still empty. Concerned that T.G. and A.J.M. were not actually living at this unit, the Cabinet obtained an ECO for A.J.M., and she was placed in the Cabinets custody. A few days later, on August 30, 2004, the Cabinet filed a petition with the Jefferson Family Circuit Court alleging that A.J.M was at a significant risk of neglect if left in the care of T.G. In its petition, the Cabinet cited evidence of this risk by noting the batting cage incident; the deplorable condition of T.G.'s primary residence, unit #43; the possibility that T.G. and A.J.M. may not be living at the approved housing, unit #57; and the concerns expressed by the workers at A.J.M.'s day care over T.G.'s erratic behavior.[1]

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[1] In its petition, the Cabinet stated that the staff and the Kindercare learning center, where A.J.M attended daycare, "has indicated concerns of [T.G.]'s behavior, specifically stating there have been several times [T.G.] has brought the child into daycare with only a diaper on and has asked the teacher to dress the child. On morning of 8-18-04, [T.G.] brought child to daycare dressed. [T.G.] was asked to fill out a form, in middle of doing so she stopped, grabbed the child and stormed outside. [T.G.] then brought child back into daycare undressed, she asked the teacher to dress child when she woke up (the child was already awake in [T.G.]'s arms). Daycare indicates child appears never to be clean and her clothes are filthy. On first day [T.G.] came to pick child up from daycare she did not recognize her child. [T.G.] looked at the teacher and then at her child and then asked where her child was, she then slowly turned around and panicking (sic) asking where her child was."

After conducting a temporary removal haring to address the allegations stated in the Cabinet's petition, the family court found on September 1, 2004, that there were reasonable grounds to believe the petition's allegations and that the Cabinet should have temporary custody of A.J.M. The family court also ordered T.G. to follow certain recommendations regarding treatment of her mental illness and improving the condition of her home. Furthermore, the Cabinet worked with T.G. to design a case plan with several tasks to be undertaken by T.G., such as completing parenting classes, attending counseling sessions, and complying with the terms of her visitation with A.J.M., completing psychological and psychiatric evaluations, and contacting the Cabinet monthly.

Pursuant to her case plan, T.G. participated in a psychological and psychiatric evaluation performed by the Foster Care Clinic and Assessment Team (FORECAST) on September 23, 2004, and started attending a Parenting Skills class offered by Seven Counties. Despite these efforts, on October 5, 2004, a Cabinet social worker conducted a third home visit of T.G.'s residence and found the home to still be in the same deplorable condition, noting dog feces on the floor, items stacked on the couch, dirty dishes in the sink and on the kitchen counters, large boxed scattered throughout the home, and clothes and miscellaneous items piled in the kitchen. The next day, on October, 6, 2004, the Jefferson Family Circuit Court held a dependency hearing to determine the status of A.J.M., ultimately finding that she was an abused or neglected child and that she was to remain in the Cabinet's custody.

In November 2004, T.G.'s father and step-mother began supervising visits between A.J.M. and T.G. so as to help T.G. regain custody of her daughter or to attain custody of A.J.M. themselves. Although these initial visits were successful, T.G.'s step-

mother testified at trial that by February 2005, T.G. had become so difficult to deal with that they no longer sought custody of A.J.M. and were unwilling to supervise her visits with T.G. Also in November 2004, T.G. began attending therapy sessions with Allison Johnson, a licensed certified social worker and marital counselor, and participating in play evaluations with A.J.M. supervised by Seven Counties clinical psychologist, Dr. Katie LaJoie, Psy.D. Although Dr. LaJoie reported that A.J.M. was easily soothed by T.G., she also noted that T.G. did not enforce limits with A.J.M., that T.G. exhibited obsessive behaviors (cleaning the play area more than any other parent Dr. LaJoie had ever seen), and that further assessment was needed to determine if T.G. would be able to properly parent A.J.M.

In December 2004, despite the family court's order requiring T.G. to participate in counseling sessions, T.G. had a falling out with Allison Johnson after only four sessions. Johnson testified at trial that during her last session with T.G. in 2004, she had confronted T.G. very directly about her mental health issues and that their sessions had ended "in a good place, but not the best place." After T.G. left Allison Johnson, she began seeing Seven Counties therapist Aaron Bates for bi-monthly sessions. T.G. also began attending two different group classes in early 2005, a group recovery class at Recovery Incorporated in January 2005, and Seven Counties Young Families Group in February 2005. In March 2005, the Cabinet began supervising T.G.'s visits with A.J.M. Although the Cabinet observed that T.G. was loving and caring towards A.J.M., they also noted that T.G.'s behavior was erratic and bizarre, stating that she undressed and redressed A.J.M. several times during her visits and that she continued to demonstrate symptoms of severe anxiety and obsessive compulsivity.

Due to these observations and T.G.'s apparent inability to address her mental health issues, on April 4, 2005 the Cabinet filed a petition with the family court to terminate T.G.'s parental rights. Several months after the filing of this petition, starting in June 2005, T.G. participated in a psychological evaluation with Dr. Sally Brenzel, Psy.D., that lasted over a month; attended individual therapy sessions with Dr. Patricia Aulbach, Psy.D., for four months; briefly met with mental health counselor Dr. Daya Singh Sandhu, Ed.D.; and finally, in November 2005, returned as a patient to Allison Johnson. Prior to her termination of parental rights trial, which was held on December 20, 2005, T.G. had completed three sessions with Allison Johnson. In the termination trial, the family court primarily considered the testimony of the four therapists mentioned above[1] as well as Peggy Kinnetz, Ed.D., T.G.'s Seven Counties parenting group facilitator, and Sky Tanghe, a Cabinet social worker who had been involved with T.G.'s case since 1996.

Although T.G. herself explained in detail the circumstances surrounding the batting cage incident and the unsanitary condition of her home, the majority of the Cabinet's case focused on T.G.'s long-lasting hostile relationship with the Cabinet, her inability to develop a lasting relationship with a therapist, her refusal to accept and adequately deal with her mental health issues, and the effect that T.G.'s unstable mental health would have on her ability to parent A.J.M. After considering all the evidence, on March 14, 2006, Judge Stephen George of the Jefferson Family Circuit Court entered an order finding that A.J.M. was an abused or neglected child as defined in KRS 600.020(1), and grounds existed

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[1] While both Dr. Brenzel and Allison Johnson testified at trial, the family court also considered the depositions of Dr. Aulback and Dr. Sandhu in making its determination.

under KRS 625.090(2) to support the termination of T.G.'s parental rights, and that it was in A.J.M.'s best interest for T.G.'s parental rights to be terminated and for the custody of A.J.M. to be transferred to the Cabinet for Health and Family Services.

In her appeal to the Kentucky court of Appeals, T.G. raised three arguments. First, she argued that KRS 625-090(1)(a)1 was unconstitutional because it permitted a court to adopt a prior court's finding of abuse or neglect, and in so doing, hold that a child is neglected using a lower standard of proof than required in a termination proceeding. T.G.'s second and third arguments were that neither the family court's finding of neglect, nor its conclusion that several grounds supporting terminations existed under KRS 625-090(2) were supported by substantial evidence. Although the Court of Appeals found that KRS 625-090(1)(a)1 was constitutional if correctly applied, it ultimately agreed with T.G. that no substantial evidence existed in the record to support the trial court's finding of neglect or its finding of grounds for termination. Following this Court's grant of discretionary review, the Cabinet now argues that KRS 625.090(1)(a)1 is constitutional on its face, the family court's findings were supported by substantial evidence, and the Court of Appeals engaged in an improper *de novo* review of the record in concluding otherwise. Having thoroughly reviewed the record in this case, we agree with the Cabinet that the family court was not clearly erroneous in its holding and its findings were supported by substantial evidence.

Analysis

I. Because the Family Court Expressly Found In Its Termination of Parental Rights Proceeding That A.J.M. Was An Abused Or Neglected Child Under KRS 625-090(1)(a)2, T.G.'s Constitutional

Challenged to KRS 625-090(1)(a)1 Is Not Properly Before This Court.

Although T.G. did not raise this issue before the trial court, she argued to the Court of Appeals that KRS 625.090(1)(a)1 is unconstitutional because it allows a court to adopt a prior court's finding of abuse or neglect, and in so doing, find that a child is neglected using a lower standard of proof, preponderance of the evidence, than required in a termination proceeding, clear and convincing. [1] KRS 625.090(1) states

> (1) The Circuit Court may involuntarily terminate all parental rights of a parent of a named child, if the Circuit Court finds from the pleadings and by clear and convincing evidence that:
>
> (a) 1. The child has been adjudged to be an abused or neglected child, as defined in KRS 600.020(1), by a court of competent jurisdiction;
>
> 2. The child is found to be an abused or neglected child, as defined by KRS 600.020(1), by the Circuit Court in this proceeding; or

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[1] In T.G.'s case, A.J.M. was previously adjudged to be abused or neglected in a dependency proceeding using the preponderance of the evidence standard. However, the United States Supreme Court has held that in termination of parental rights proceedings, due process requires the trial court's findings to be supported by clear and convincing evidence. See Santosky v. Kramer, 455 U.S. 745, 102 S. Ct. 1388, 71 L. Ed. 2d 599 (1982). This case has an added twist because Family Court Judge Stephen George presided over both the dependency proceedings and the termination preceding and thus, was in a position to assess all of the evidence.

> 3. The parent has been convicted of a criminal charge relating to the physical or sexual abuse or neglect of any child and physical or sexual abuse, neglect, or emotional injury to the child named in the present termination action is likely to occur if the parental rights are not terminated; and
> (b) Termination would be in the best interest of the child.

The Court of Appeals addressed this argument and implied that this statute could be unconstitutional if the circuit court did not make independent findings of abuse and neglect under the clear and convincing standard. We decline to address this issue because it is not before us in this case.

If the family court in this instance had only found under the first prong that A.J.M. had previously been adjudged to be an abused or neglected child, then it appears that T.G.'s argument regarding the statute's constitutionality would be relevant. However, in this case, the Jefferson Circuit Family Court not only found that the first prong was met, but also, expressly found that based on the evidence presented in the termination proceeding, A.J.M. was an abused or neglected child was defined in KRS 600.020(1). Because the statute indicates that only one of the three prongs listed in KRS 625.090(1)(a) needs to be met, and because the family court expressly found under KRS 625.090(1)(a)2 that A.J.M. was abused or neglected based on clear and convincing evidence, T.G.'s argument regarding the constitutionality of KRS 625-090(1)(a)1 was not properly before us.

II. Substantial Evidence Existed to Support the Family Court's Finding that A.J.M. Was Abused or Neglected.

When an appellate court reviews a decision to terminate parental rights, it must determine if the family court's conclusion was based upon clear and convincing evidence and, in so doing, must apply the clearly erroneous standard of appellate review. CR 52.01; J.M.R. v. Commonwealth of Kentucky, Cabinet for Health and Family Services, 239 S.W.3d 116, 120 (Ky. App. 2007). "Clear and convincing proof does not necessarily mean uncontradicted proof. It is sufficient if there is proof of a probative and substantial nature carrying the weight of evidence sufficient to convince ordinarily prudent-minded people." M.P.S. v. Cabinet for Human Resources, 979 S.W.2d 114, 117 (Ky. App. 1998), *citing* Rowland v. Holt, 253 Ky, 718, 726, 70 S.W.2d 5, 9 (1934). Pursuant to the standard, an appellate court is obligated to give a great deal of deference to the family court's findings and should not interfere with those findings unless the record is devoid of substantial evidence to support them. K.R.L. v. P.A.C., 210 S.W.3d 183, 187 (Ky. App. 2006). In this context, substantial evidence exist if the proof presented would have convinced a reasonable person by clear and convincing evidence that A.J.M. was an abused or neglected child. With this clear and convincing evidentiary standard in mind, we find that T.G.'s case, the record contains the requisite evidence to support the trial court's finding that A.J.M. was an abused or neglected child defined in KRS 600.020(1).

> The relevant portions of KRS 600.020(1) state (1) "Abused or neglected child" means a child whose health or welfare is harmed or threatened with harm when his parent, guardian, or other person

exercising custodial control or supervision of the child:

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(b) Creates or allows to be created a risk of physical or emotional injury as defined in this section to the child by other than accidental means;
(c) Engages in a pattern of conduct that renders the parent incapable of caring for the immediate and ongoing needs of the child including, but not limited to, parental incapacity due to alcohol and other drug abuse as defined in KRs 222.005;
(d) Continuously or repeatedly fails or refuses to provide essential parental care and protection for the child, considering the age of the child;

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(i) Fails to make sufficient progress toward identified goals as set forth in the court-approved case plan to allow for the safe return of the child to the parent that results in the child remaining committed to the cabinet and remaining in foster car for fifteen (15) of the most recent twenty-two (22) months;

Although the batting cage incident and the condition of T.G.'s home (during three home visits in July,

August, and October 2004) were alleged as grounds to support the Cabinet's petition, the evidence relied upon by the trial court in its finding of neglect primarily related to T.G.'s unstable mental health and significant risk it posed to A.J.M. Of particular importance was the evidence showing that although T.G. genuinely loved her daughter and had made efforts to regain custody of her, T.G.'s mental illness, which has not significantly improved since her diagnosis in 1997, will continue to go untreated and will render T.G. incapable of properly parenting A.J.M. The Cabinet presented five witnesses in support of its peitition.

Sky Tanghe

Sky Tanghe, a social worker employed by the Cabinet had been involved with T.G's family since September 1996. Tanghe gave a detailed history of the different mental health and parenting services offered to T.G. by the Cabinet since 1996, when the Cabinet filed its first petition against T.G. alleging neglect of her then one-year-old-son, N.M. Tanghe testified that in September 1996, T.G. was ordered to attend counseling sessions and allegedly did so in North Carolina, where her son's biological father was living. Nearly a year later, in May 1997, T.G. participated in her first psychological evaluation, performed by Dr. Dennis Cambron, Ph.D. Tanghe stated that Dr. Combron assessed T.G. to be of high average intelligence, noted her weaknesses in understanding normal developmental expectations for an infant, and diagnosed T.G. as having Obsessive Compulsive Personality disorder. Dr. Combron recommended that T.G. continue participating in co-dependency group classes and focus her individual therapy sessions on her personality disorder.

Tanghe then noted that in December 1999, after a referral was made by Seven Counties, T.G.

received a parent-aid and services from the HELP Team. In October 2001, Seven Counties referred T.G. to the FACTs Team and T.G. began participating in supervised visits with her two children, N.M. and B.M., at Family Place. After three supervised visits, however, T.G. had a falling out with the Family Place staff and refused to have any further visits. This service was subsequently terminated.[1] In December 2001, Dr. David Winsch, Ph.D., performed another psychological evaluation of T.G., concluding that T.G. met the criteria for an Obsessive compulsive Disorder and that her mental illness seriously interfered with her parenting skills. Dr. Winsch noted, however, that if T.G. had a positive response from treatment services offered by the Cabinet, such as childcare, family counseling, and in-home monitoring, she could be capable of providing appropriate care for her children. Despite this recommendation, in May 2001, T.G. stipulated to the neglect of both N.M. and B.M.; in July 2001, the Cabinet filed its fourth petition alleging lack of supervision and abusive discipline; and in May 2002, the family court awarded permanent custody of both children to the maternal grandmother.

Continuing with T.G.'s history of mental health services, Tanghe stated that in August 2002, Dr. Anna Podolskaya, M.D., performed another psychological evaluation of T.G. After the session, Dr. Poloskaya noted that T.G. demonstrated paranoid behavior and blamed everyone but herself for the removal of her children. Tanghe stated that T.G. next instance of involvement with the Cabinet came after

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[1] Dr. Sally Brenzel's report of T.G. psychological evaluation, which was admitted into evidence at trial, notes tat at the close of each of these supervised visits in October 2001, T.G. would engage in inappropriate, disruptive behavior that ultimately led to her being escorted from the building by a security officer.

the birth of A.J.M. in January 2004.[1] Following the return of A.J.M. to T.G. on January 12, 2004, the Cabinet placed a HELP team with T.G. for a period of 45 days. Tanghe also stated that T.G. was receiving help from Seven Counties during this period. Following the removal of A.J.M. from T.G.'s care in September 2004, Tanghe noted that T.G> participated in psychological evaluations with the Foster Care Clinic Assessment Team (FORECAST) and with Dr. Sally Brenzel, completed a parenting class and "baby school" offered by Seven Counties, and was referred to Dr. Patricia Aulback by Seven Counties for individual therapy sessions. Despite T.G.'s numerous opportunities since 1997 to address her mental health., Tanghe ultimately stated that T.G.'s lack of improvement in attending individual therapy sessions and developing an ongoing relationship with a therapist made a successful reunification with A.J.M. unlikely.

Regarding T.G.'s lack of improvement, Tanghe testified that after T.G. had been seeing Dr. Aulback for four months, T.G. stopped attending her sessions and claimed that she did not trust Dr. Aulbach. Tanghe also stated even though T.G. does well in structured, supervised settings, there was still a very high risk that T.G. would not be able to deal with the issues that would arise as A.J.M., who was almost two years old a the time of the trial, continues to develop. Furthermore, Tagnhe noted that A.J.M. has flourished in her foster home and that her foster parents are interested in adopting her if T.G.'s parental rights are terminated. Tanghe testified that if T.G. had taken advantage of the many services that had been provided to her, she could have made progress. However, because T.G. has chosen not to be

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[1] It does not appear from the record that T.G. engaged in any mental health counseling or treatment services from 2002 till 2004.

open to such improvement, Tanghe did not believe there was a likelihood of a successful reunification.

Dr. Peggy Kinnitz, Ed.D.

Dr. Peggy Kinnetz, Ed.D., was qualified by a trial court as a mental health expert. Dr. Kinnetz stated that she led of the group classes T.G. completed with Seven Counties. From November 4, 2004 to January 5, 2005, T.G. completed a Parenting Skills class, and from February 23, 2005 to June 29, 2005, T.G. completed a Young Families class. Dr. Kinnetz testified that based on T.G.'s performance in these classes she observed that T.G. has some difficulty properly setting boundaries for A.J.M. and that T.G.'s needs sometimes interfered with her daughter's. Dr. Kinnetz stated that T.G.'s anxiety impacted her ability to relate to others and that she has assumed very little responsibility for the alleged neglect of her children. With regard to specific areas still needing improvement, Dr. Kinnetz testified that T.G. needs to work on her ability to act on behalf of her child. Dr. Kinnetz explained that when T.G. has to interact with governmental agencies, her community, or society in general, she tends to react with suspicion and mistrust. Dr. Kinnetz expressed concern that in these situations, T.G. could end up isolating herself and her child. When asked if additional group classes would help T.G., Dr. Kinnetz replied that since T.G.'s issues are more personal, such as relating to others, more group classes would not be particularly beneficial. Ultimately, Dr. Kinnetz did not recommend returning A.J.M. to T.G. at the time of the trial because she feared T.G.'s mistrust and paranoia could negatively impact A.J.M.

Dr. Sally Brenzel, Psy.D.

Dr. Sally Brenzel, Psy.D., was also qualified as a mental health expert by the trial court. From June

1, 2005 till July 18, 2005, Dr. Brenzel conducted four and a half hours of clinical interviews with T.G. and ultimately produced a psychological evaluation of T.G.[1] Dr. Brenzel testified that T.G. was very bright, cooperative in keeping appointments and answering questions, and initially conducted herself with an appropriate guardedness. When asked about T.G.'s ability to improve her mental health, however, Dr. Brenzel testified that although T.G. does verbalize a motivation to change, her prognosis for change is poor because she does not appear to learn from her experiences and consistently engages in a dysfunctional pattern of behavior. Dr. Brenzel explained that T.G.'s motivation to follow through with her treatments does not endure and is only in response to external circumstances, such as the Cabinet's insistence. In her evaluation report, Dr. Brenzel expanded on T.G.'s inability to recognize a need for improvement, noting that

[i]n interviews with professionals, including this examiner, T.[G]. has assertively maintained that she has never abused or neglected her children and/or behaved inappropriately but rather that her family, associates, and Child Protective Services have wrongly accused, misunderstood and/or disagree with her, worked against her, and have their own agendas regarding removing her children from her care. T.[G]. cited her only problems to be the stress involved with her job and related financial pressure, her 'stubbornness and over-confidence' that she can handle it all, her 'anger response' to outside interference in her life that 'takes energy and time away from the kids that I don't have to spare,' and an inadequate support system.

Dr. Brenzel also discussed T.G.'s anxiety and paranoia, which became evident after T.G.'s reaction

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[1] In addition to her testimony about this evaluation, Dr. Brenzel's report regarding T.G.'s evaluation was admitted into evidence at trial.

to the Rorschach Inkblot Test, which requires patients to describe what they see in ten abstract designs, and the Thematic Apperception Test (TAT), which asks the examinee to tell a story in response to a set of pictures. Dr. Brenzel explained that although T.G.'s responses to the inkblot test undermined the soundness of her judgment and her ability to engage in functional relationships, T.G. initially responded well to the TAT. However approximately two hours after session had ended, T.G. left for extensive messages on Dr. Brenzel's voice mail in which she sought to clarify her answers and provide new stories for some of the pictures. Dr. Brenzel testified that in the messages, T.G. was very upset and accused Dr. Brenzel of showing her inkblot pictures that encouraged devil worship. Dr. Brenzel testified that in the messages, T.G. also accused a Seven Counties employee she had seen upon leaving her session of being out to get her and of being in control evaluation. In her evaluation report, Dr. Brenzel further explained that she contacted T.G. by telephone the following day in order to discuss T.G.'s phone messages. T.G. stated that she just wanted to do well on the test and would tell Dr. Brenzel what she wanted to hear. When Dr. Brenzel expressed concern for T.G.'s emotional state, T.G. replied that she felt relieved after leaving the phone messages and noted that even if she lost all three of her children, she would not "go in a hole." T.G. stated that she had "a positive drive" and would "go onto something else" if that happened.

When questioned about T.G.'s specific mental illness, Dr. Brenzel stated that she diagnosed T.G. with Generalized Anxiety Disorder (GAD) and Borderline Personality Disorder with Obsessive Compulsive traits. Dr. Brenzel testified that these conditions dramatically affect T.G.'s ability to be a parent, noting that although T.G. has the intelligence and the genuine desire to be a good parent, her

mental illness has consistently prevented her from being able to exercise good judgment regarding safety, supervision, discipline, and educational requirements. Furthermore, Dr. Brenzel stated that due to her illness, T.G. has been unable to navigate critical relationships with her family, school personnel, social service workers, and mental health professionals. In looking ahead to the future, Dr. Brenzel noted that as A.M.J. gets older and more able to assert herself, T.G.'s mental illness will make it more and more difficult for her to properly parent A.J.M. Although Dr. Brenzel recognized the possibility for improvement if T.G. makes a lasting connection with a therapist, she also stressed that based on T.G.'s past experiences, she did not believe that T.G. could maintain such a connection over time. In conclusion, Dr. Brenzel testified that T.G.'s "prognosis to successfully parent A.J.M. was poor."

Dr. Patricia Aulbach, Psy.D.

The trial court also considered the deposition testimony of Dr. Patricia Aulbach, Psy.D., a clinical psychologist employed by Seven Counties who engaged in regular therapy sessions with T.G. from June 8, 2005 till September 27, 2005.[1] In describing her initial impressions of T.G., Dr. Aulbach stated that T.G. never acknowledged any responsibility for the removal of A.J.M. and had a difficult time coming up with areas of parenting with which she needed help. Dr. Aulbach noted that T.G.'s severe paranoia prevented her from focusing specifically on A.J.M. because she consistently worried about a conspiracy against her involving the Court, the Cabinet, and Seven Counties. Dr. Aulbach further explained that in general, T.G. was unable to develop a therapeutic

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[1] This deposition was conducted on January 13, 2006, several weeks after the termination of parental rights trial.

relationship with her because T.G. feared that anything done during her sessions would ultimately be used against her by the Cabinet. Although Dr. Aulbach agreed tat this was an understandable concern for someone facing the termination of parental rights proceeding, she also stated that where she had been able to develop lasting relationships with other clients facing similar circumstances, she was not able to get past the worries and constraints of T.G.

After several sessions with T.G., Dr. Aulbach eventually diagnosed T.G. with Generalized Anxiety Disorder, Paranoid Personality Disorder, and a rule-out of Delusional Disorder, which means there is some evidence present but not enough to make a complete diagnosis. Dr. Aulbach stated that although Generalized Anxiety Disorder is responsive to medication, treatment for a Paranoid Personality Disorder requires "a long-term, trusting therapeutic relationship where a therapist and the client work together to establish new patterns of behavior and new experiences in response to those patterns of behavior that are corrected."

In explaining why she was unable to develop a relationship with T.G., Dr. Aulbach noted that during their August 12, 2005 sessions, T.G. was unable to deal with her emotional issues and was pre-occupied with the upcoming parental rights hearing.[1] After the hearing was re-scheduled for December, however, T.G.'s next session was much better and she showed

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[1] T.G.'s termination of parental rights hearing was originally scheduled for August 18, 2005. However, after T.G.'s counsel made a motion to withdraw and T.G. expressed a desire to proceed pro se, the family court reluctantly granted a continuance. In delaying the trial, the family court explained that the serious nature of a termination proceeding required it to ensure that T.G.'s rights were adequately represented and it was not comfortable allowing her to proceed pro se. At this point, the family court set T.G.'s trial for December 20, 2005.

an interest in improving. At the conclusion of this session, Dr. Aulbach asked T.G if she could make a choice between focusing on her mental health issues with Dr. Aulbach as her therapist versus Dr. Aulbach as a court representative. Despite this hope for improvement, at T.G.'s next appointment on August 30, 2005, Dr. Aulbach stated that T.G. had an altercation with the receptionist over her co-pay, expressed a lot of paranoid thinking towards Dr. Sally Brenzel, and complained about a conspiracy amount Seven Counties, Dr. Brenzel, and the Cabinet. Dr. Aulbach noted that T.G. was unresponsive to her attempts at breaking through this paranoid-thinking process. It appears from Dr. Alubach's testimony that T.G. did not attend another session with her until September 27, 2005. During this final session, T.G. was angry with Dr. Aulbach for sharing T.G.'s diagnosis with Dr. Brenzel and expressed distrust with their relationship. Dr. Aulbach stated that since T.G. was not willing to work with her on her mental health issues, they terminated their relationship on that day.

When asked how T.G's condition could affect her ability to parent a two-year-old, Dr. Aulbach explained that her main concern would be T.G.'s potential for distorting the motivations of people genuinely trying to help and be involved in A.J.M.'s life. Dr. Aulbach also noted that she often felt like T.G. was more concerned with not looking bad in from of people rather than with A.J.M.'s well-being. Ultimately, Dr. Aulbach stated that at the time she stopped seeing T.G., which was two and a half months before the termination of parental rights trial, T.G.'s prognosis for improvement was poor unless T.G. became willing to really work with her mental health issues with a therapist.

Dr. Daya Sandhu, Ed.D.

The trial court also considered the deposition testimony of Dr. Daya Sandhu, Ed.D., which was taken on August 3, 2005. Dr. Sandhu testified that he met with T.G. for approximately three or four sessions in July 2005. Dr. Sandhu stated that when he first met with T.G., she was overwhelmed and anxious. Although he suggested that she start taking medication for her anxiety, T.G. replied that she was afraid to take medication because the Cabinet would then think she was a psychiatric patient and not give her child back. Dr. Sandhu stressed in his deposition that he really was not able to make predictions about T.G.'s ability to improve or to parent a child because he felt like he had only seen the "tip of the iceberg." He did note, however, that he and T.G. were still planning on having counseling sessions once a week, and that after least six months, he should be able to assess her parenting abilities. Although Dr. Sandhu seemed hopeful and willing to engage in a therapeutic relationship with T.G. at the time of the deposition, T.G. soon stopped attending her sessions with him. (in her trial testimony, T.G. stated that she ended their relationship because she was uncomfortable meeting with Dr. Sandhu in the same office where her former attorney also worked.)

In addition to the witnesses called by the Cabinet, Allison Johnson, a licensed social worker and marriage counselor, testified on behalf of T.G. at the termination proceeding.

Allison Johnson

Johnson originally met with T.G. for four sessions in November 2004, During these sessions, Johnson stated that T.G. was very anxious and paranoid. Johnson revealed that their sessions

stopped after she confronted T.G. very directly about her mental health. Although Johnson noted that the sessions ended in a good place, it was not "the best place," and T.G. subsequently ended their therapeutic relationship. One year later, in November 2005, T.G. returned to Johnson in order to seek therapy again. At the time of the parental rights trial, in December 2005, Johnson had completed three sessions with T.G. Based on these meetings, Johnson testified that T.G appeared less anxious and more willing to cooperate and work on her issues. Although Johnson stated that she could not predict whether their relationship would continue, she recognized that it felt connected so far. Johnson also noted that even though T.G. has the ability to become an effective parent, she needs to understand that it will require intensive and long-term therapy. Lastly, Johnson acknowledged that at some point if T.G. continues to engage in therapy, T.G. would be capable of a systematic and supervised return of A.J.M. However, at the time of her testimony, Johnson could not recommend returning A.J.M. to T.G.'s care. Rather, Johnson recommended that eventually, there be a "structured, systematic transition."

The testimonies ad depositions of the above-motioned therapist and social workers constitute substantial evidence of a clear and convincing nature supporting the trial court's finding that

> [t]he mental illness of the respondent and her history of resultant abuse or neglect to her children create a substantial ongoing risk to [A.J.M.]. [T.G.]'s cooperation in various treatment services has not remedied her symptonms or improved her condition to a point that she can safely provide for [A.J.M.]. Her behaviors remain volatile,

> erratic, paranoid, obsessive and compulsive, and contrary to the provision of a safe, stable environment for the infant petitioner.

Not including T.G.'s opportunity for improvement following the removal of her two oldest children in 1996, since the removal of A.J.M. in September 2004, T.G. has seen four different therapists: Allison Johnson in November 2004, Aaron Bates in March 2005, Dr. Patricia Aulbach from June 2005 till September 2005, Dr Daya Sandhu in July 2005, then back to Allison Johnson in November 2005. Furthermore, through her psychological evaluations and Seven Counties services, T.G. has had the opportunity to improve her mental health situation through her interactions with Dr. John Gallehr. M.D., and Dr. Larry Meyers, M.D., of the FORECAST Team; Katie Lajoie, Psy.D., of Seven Counties; Peggy Kinnezt, Ed.D., of Seven Counties; Sky Tanghe of Seven Counties; and Dr. Sally Brenzel, Psy.D.

Of these therapist and social workers who testified, no one could recommend the reunification of A.J.M. and T.G. at the time of the trial. As a matter of fact, other than Allison Johnson, the therapists who expressed an opinion of T.G.'s prognosis for improvement all agreed it was poor. Sky Tanghe stated that reunification would be unlikely because of T.G.'s history of avoiding her mental health issues and her lack of improvement. Peggy Kinnezt did not recommend returning A.J.M. for fear of the impact of T.G.'s mistrust and paranoia on A.J.M. Dr. Brenzel testified that T.G.'s prognosis is poor because she is unable to recognize a need for improvement. Dr. Aulbach stated that T.G.'s paranoia prevented her from focusing on A.J.J.'s needs, expressed concern that T.G. would distort the motivations of people trying to genuinely help A.J.M., and concluded that T.G.'s prognosis for improvement was poor. Although

Allison Johnson seemed hopeful that her relationship with T.G. would continue and that T.G. could improve over time, even she could not recommend reuniting A.J.M. with T.G. at the time of the trial. Based on the aforementioned testimonies and depositions, we find that substantial evidence exist in the record to convince a reasonable person by clear convincing evidences that A.J.M. was an abused or neglected child as defined in KRS 600.020(1). Therefore, the trial court was not clearly erroneous in making its findings and we will not disturb its ruling on appeal.

Before turning to the grounds of termination, we note that the Court of Appeals reviewed this same evidence but focused almost exclusively on the fact that T.G.'s mental illness was "treatable" and the fact that A.J.M. had suffered no physical or emotional injury. However, the trial court properly recognized that the extensive efforts to address T.G.'s mental issues over many years had been unsuccessful, in large part due to T.G.'s failure to follow through with various mental health providers. This wile theoretically treatable, T.G.'s mental illness had been for years, and promised to remain, a serious obstacle to effective parenting. Moreover, the absence of actual physical or obvious emotional harm to two year-old A.J.M. is not dispositive because, as the trial court recognized, the "substantial ongoing risk" created by T.G.'s conduct brought A.J.M. clearly within the definition of an abused or neglected child as defined in KRS. 600.020(1)(b).[1] We cannot overemphasize that the Cabinet and the courts need to wait for actual physical or emotional injury in order to protect an abused or neglected child.

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[1] KRS 600.020(1)(b) expressly applies to situations where a parent or guardian "creates or allows to be created a risk of physical or emotional injury...."

III. Substantial Evidence Existed to Support the Family Court' Finding that One Or More Grounds Were Present to Justify Terminating T.G.'s Parental Rights of A.J.M.

KRS 625.090(2) states that

> No termination of parental rights shall be ordered unless the Circuit Court also finds by clear and convincing evidence the existence of one (1) or more of the following grounds.

The statute then enumerates ten grounds justifying termination. In its findings of fact, the trial court determined that two of these grounds, KRS 625.090(2)(e) and (g), were present in T.G.'s case, stating

> The respondent, [T.G.]' for a period of not less than six (6) months, has continuously or repeatedly failed or refused to provide or has been substantially incapable of providing essential parental care and protection for the petitioner child, [A.J.M.], and there is no reasonable expectation of improvement in parental care and protection considering the age of the child.
> The respondent, for reasons other then poverty alone, has continuously or repeatedly failed to provide or is incapable of providing essential food, clothing, shelter, medical care or education reasonably necessary and available for the petitioner child's well-being and there is no reasonable expectation of significant improvement

> in the parent's conduct in the immediately foreseeable future, considering the age of the child.

Although the Court of Appeals found that the trial court was clearly erroneous in making these findings,[1] the Cabinet argues adamantly on appeal that substantial evidence exists in the record supporting the family court's determinations on this issue. We must agree with the Cabinet.

First, there was substantial evidence relied upon by the trial court that since September 2004, and for reasons other than poverty alone, T.G.'s mental illness has rendered her incapable of providing essential care, protection, and basic necessities for A.J.M. Sky Tanghe testified that T.G.'s history of neglect and her lack of improvement had created a high-risk that T.G. cannot adequately care for A.J.M. Tanghe also noted that T.G.'s difficulties will increase as A.J.M. grows into a toddler. In recommending that A.J.M. not be reunited with T.G., Peggy Kinnetz testified that it is difficult for T.G. to act on behalf of A.J.M. and that T.G. will likely isolate herself and A.J.M. because of her paranoia and mistrust of others. Dr. Brenzel stated that T.G.'s

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[1] The Court of Appeals made no reference whatsoever to the trial court's finding regarding failure to provide "essential care and protection." As to "essential food, clothing, shelter or medical care," the appellate court concluded summarily there was not substantial evidence of record that A.J.M. had been denied these things and then stated: "This was evident through the results of A.J.M.'s medical examination and testimony that she is above-average on both her intelligence and developmental levels." Again, the termination may be due to a failure to provide or because the parent "is incapable of providing essential food, clothing, medical care, shelter or education." (*Emphasis supplied*). While this ground is much closer call then the failure to provide "essential parental care and protections," the trial court's finding was not clearly erroneous.

mental illness has consistently prevented her from being able to exercise good judgment regarding A.J.M.'s safety, supervision, discipline, and educational requirements; T.G. cannot form relationships essential for child-rearing; and T.G.'s inabilities will only get worse as A.J.M. gets older. Dr. Aulbach stresses that T.G.'s paranoia has consistently prevented her from being able to focus on A.J.M. basic needs. Furthermore, the trial court considered the results of several supervised play evaluations with T.G. and A.J.M., noting that T.G. had trouble setting proper boundaries for A.J.M.; T.G. obsessively cleaned the play area more than anyone the supervisors had ever seen; T.G. insisted on undressing and redressing A.J.M completely several times during each visit; and T.G. demonstrated ongoing symptoms of anxiety and obsessive compulsivity. Based on the evidence, we conclude that it was not clearly erroneous or an abuse of discretion of the family court to find that T.G. was substantially incapable of providing essential parental care, protection, and the basic necessities for A.J.M.'s well-being.

Secondly, regarding T.G.'s reasonable expectations for significant improvement, we reiterate our previous conclusion that there was ample evidence in the record supporting the trial court's finding that even at the time of the termination trial, T.G. remained "volatile, erratic, paranoid, obsessive and compulsive," and that ultimately, T.G.'s likelihood of improvement was poor. Both Dr. Aulbach and Dr. Brenzel stated that T.G.'s prognosis for improvement was poor because she was unable to recognize a ned to address seriously her mental health. In addition, Sky Tanghe noted it was T.G.'s almost decade–long history of a lack of improvement that made reunification unlikely in this case. Although Allison Johnson expressed some hope of improvement if T.G. continued their

therapeutic relationship, the fact remains that T.G. waited to reestablish this relationship until November 2005, only one month before her termination hearing, and that T.G. had only completed three sessions prior to her trial. T.G. was informed of her mental illness and her need to establish a lasting, therapeutic relationship as for back as 1997. Other than the one month she spent with Allison Johnson in November 2004, T.G. had shown no signs of improvement and had made no real effort to address her mental health issues in the ten years preceding the order terminating her parental rights to A.J.M. Furthermore, even T.G.'s witness, Johnson could not recommend that A.J.M be returned to T.G. at the time of the trial. Therefore, since the proof presented at trial would convince a reasonable person by clear and convincing evidence that T.G. had no reasonable expectations of significant improvement, we find that the trial court was not clearly erroneous in its finds that grounds existed to support the termination of T.G.'s parental rights to her third child.

CONCLUSION

The crux of T.G.'s argument throughout the case was that the family court did not have substantial evidence to support its decision to terminate her parental rights as to the two year-old A.J.M. However, the family court heard testimony from several therapist and social workers regarding T.G.'s lengthy history of neglect and abuse of her older children; her consistent failure to adequately address her mental health issues; her extreme paranoia and mistrust toward people in a position to help her and A.J.M.; and detrimental effect her unstable mental health has had and will have on her ability to parent A.J.M.; and her apparent inability to maintain a lasting relationship with a therapist, and absolute

necessity given her mental health status. Despite T.G.'s expressed desire to improve and retain custody of A.J.M., the trial court correctly concluded that in this instance, T.G.'s past behavior serves as the best predictor of her future behavior. Having found that substantial evidence exists in the record to convince a reasonable person by clear and convincing evidence that A.J.M. is an abused or neglected child and that termination of T.G.' parental rights is in A.J.M.'s best interest, we reverse the Court of appeals decision and reinstate the Jefferson Circuit Family Court's March 14, 2006 Order terminating T.G.'s parental rights as to A.J.M.

All sitting. All concur.

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Supreme Court of Kentucky

2007-SC-000436-DGE
AND
2007-SC-000821-DGE

COMMONWEALTH OF KENTUCKY, CABINET FOR HEALTH AND FAMILY SERVICES; AND A.J.M., A CHILD ..... APPELLANTS/CROSS-APPELLEES

V.

ON REVIEW FROM COURT OF APPEALS
CASE NUMBER 2006-CA-001008
JEFFERSON FAMILY CIRCUIT COURT
NO. 05-AD-500119

T.G., MOTHER ..... APPELLEE/CROSS-APPELLANT

ORDER

Appellee/Cross-Appellant's pro se petition for rehearing of the August 28, 2008, unpublished Opinion of the Court is DENIED.

All sitting. All concur.

ENTERED: February 19, 2009

/s/CHIEF JUSTICE

(2)

No. 09-120

IN THE
SUPREME COURT OF THE UNITED STATES

T.G., MOTHER

Petitioner,

versus

COMMONWEALTH OF KENTUCKY, CABINET FOR HEALTH AND FAMILY SERVICES

Respondent.

On Petition For Writ Of Certiorari
To The Kentucky Supreme Court

PETITION FOR REHEARING

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QUESTIONS PRESENTED

1. Whether KRS 625.090(1)(a), on its face, violates the United States Constitution as interpreted in *Santosky v. Kramer*, 102 S. Ct. 1399 (1982).

2. Whether KRS 625.090(1)(a), as applied by the Jefferson Family Court, violates the United States Constitution as interpreted in *Santosky v. Kramer*, 102 S. Ct. 1399 (1982).

3. Whether the Commonwealth failed to offer any substantial evidence of child abuse or neglect at the termination trial, failed to prove same by clear and convincing evidence, and thereby committed clear and reversible error.

IN THE SUPREME COURT OF THE UNITED STATES
October Term 2008
No. 09-120

T.G. Mother, Petitioner,
v.
Commonwealth of Kentucky, Cabinet for Health and Family Services, Respondent

PETITION FOR REHEARING

To the Honorable, the Chief Justice and Associate Justices of the Supreme Court of the United States:

T.G., Mother, the Petitioner, prays that this Court's Order denying her Petition for Writ of Certiorari be set aside and a rehearing of same granted.

OPINION BELOW

The judgment of the Kentucky Supreme Court was entered on February 19, 2008.

JURISDICTION

The jurisdiction of the Supreme Court is invoked under 28 U.S.C. § 1257(i).

PARTIES

T.G., Mother, Petitioner.

Commonwealth of Kentucky, Cabinet for Health and Family Services, Respondents.

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STATEMENT OF THE CASE

Procedural history.

This action arises out of a Petition filed on or about April 8, 2005 by the Commonwealth of Kentucky, Cabinet for Health and Family Services (hereafter "the Cabinet" or "Respondent") against T.G. (hereafter "T.G." or "Petitioner"), action # 2006-CA-001008, Jefferson Family Court, *T.G., Mother v. Commonwealth of Kentucky, Cabinet for Health and Family Services; A.J.M., an Infant* (hereafter "the Jefferson Family Court action"). Following a bench trial on December 20, 2005, the Jefferson Family Court entered an Order on March 14, 2006, finding that A.J.M. was an abused or neglected child as defined in KRS 600.020(1), and that it was in A.J.M.'s best interest that T.G.'s parental rights be involuntarily terminated.

T.G. appealed that judgment to the Kentucky Court of Appeals which, by an Opinion rendered on May 18, 2007, reversed the holding of the trial court. The Cabinet then appealed to the Kentucky Supreme Court which, on August 21, 2008 reversed the holding of the Kentucky Court of Appeals and reinstated the Order of the trial court.

T.G. then petitioned this Court for a Writ of Certiorari to review the said Judgment. That Petition was denied by Order of this Court

REASONS FOR GRANTING THE PETITION

1. KRS 625.090(1)(a)(1) is unconstitutional.

Respectfully, Petitioner insists that KRS 625.090(1)(a)(1) is unconstitutional both on its face and as applied by the trial court, because it circumvents the requirement that all facts must be found by "clear and convincing evidence," and allows the trial court to adopt findings from the dependency adjudication of "abuse and neglect", the "threshold" issue, which only requires proof under the lower "preponderance of the evidence" standard.

The position of the Commonwealth, as set out at page fourteen of the brief which it filed in the Kentucky Court of Appeals is as follows:

> Assuming arguendo that this dependency adjudication was the sole basis for a finding of abuse or neglect herein, a finding under K.R.S. 625.090(1)(a)(1) alone would not have violated due process.

The Commonwealth's position appears to be that once a child has been adjudicated dependent, abused, or neglected under the lower "preponderance of evidence standard in a prior dependency adjudication, the only evidence needed to meet the required threshold of proof in a subsequent termination trial - that the child is

actually, factually, neglected or abused - is entry of the prior adjudication judgment into the record, with nothing more.

Such is, of course, exactly what the aforesaid subsection provides, and is the reason why that subsection violates the United States Constitution. Such is manifestly the case.

It is, for example, akin to stating that the Commonwealth could bring a civil action for murder against a defendant, obtain a judgment by preponderance of the evidence, and then solely upon the civil judgment with no additional proof, bring criminal charges, enter a certified copy of the civil judgment, and obtain a criminal conviction "beyond a reasonable doubt," or at least could do so if the Kentucky General Assembly enacted a statute so providing.

At the termination trial, there were no opening or closing statements, and therefore the Commonwealth's approach to "evidence of abuse or neglect" (which consisted primarily of evidence of a dirty home), and its failure to offer evidence of that (supposed) "neglect" at the trial itself, could not be brought to the court's attention.

It is clear, from the Commonwealth's arguments in the court below, that it maintained that entry of a certified copy of a dependency adjudication alone could provide an adequate basis for proving by "clear and convincing" evidence that the child was abused or neglected.

The record of that trial shows that only one witness, Sky Tange, testified concerning "abuse and neglect." As the record demonstrates, her testimony

was cursory, at best, and did not establish by clear, convincing and substantial evidence that TG's child was abused or neglected.

Petitioner maintains that the trial court committed clear error by making findings that the child was abused or neglected when such fact had not been proven in the termination trial itself. The only actual "evidence" placed in the record upon the threshold issue was a certified copy of the dependency judgment.

That judgment, however, had been adduced at the lower preponderance of evidence standard, and the evidentiary findings cannot be substituted for the clear and convincing findings required in a termination trial.

Indeed, the aforementioned Brief of the Commonwealth tacitly concedes that no substantial evidence of abuse and neglect was proven at the termination trial. The Commonwealth was, consequently, left with no option except re-characterizing the testimony of its expert witnesses.

The expert testimony offered by the Commonwealth at the termination trial was not offered to support the threshold finding, but was offered to support post-threshold findings. On appeal, however, the Commonwealth tacitly conceded that no evidence of abuse of neglect had been adduced at the termination trial, in support of the threshold finding. The only (supposed) evidence was offered to support post-threshold findings. Consequently, on appeal the Commonwealth was forced to re-characterize the expert testimony as supporting the threshold finding

of abuse or neglect.

The attempt is was and is nonavailing, since the only "abuse of neglect" alleged were the dirty home and the batting cage incident, and none of the experts testified about either of these topics.

In fact, the expert witnesses called by the Commonwealth only offered testimony concerning the Petitioner's mental state. None of them made any attempt to show that the Petitioner's mental state had any connection to the supposed "abuse of neglect." The expert testimony was not elicited to support a finding that the child had been abused or neglected.

The Commonwealth, rather, assumed that the certified copy of the judgment was, standing alone, adequate proof of the threshold issue. It therefore elicited the evidence for post-threshold inquiries, including the ten factors set out in KRS 625.090(2).

All of the psychological testimony elicited by the State was offered to prove post-threshold issues. The Commonwealth, obviously, did so because it believed that it had satisfied its burden of proof on the threshold issue by filing a certified copy of the judgment. The trial court sustained this position and t hereby committed reversible error.

The controlling legal precedent, *Santosky v. Kramer*, 455 U.S. 745 (1982), requires that abuse or neglect, actual, factual "evidence" of abuse or neglect, be proven in a termination trial, and that findings be made upon "clear and convincing" evidence.

Both the Commonwealth and the statute state that actual, factual "evidence" of abuse or

neglect need not be proven at all in the termination trial, so long as what is proven is a prior adjudication of neglect or abuse at the lower "preponderance of evidence" standard.

The Commonwealth evidently maintains that the Kentucky General Assembly has succeeded in evading the due process requirements of the United States Constitution. The Commonwealth mischaracterizes the intention of the General Assembly. That body, rather, made a good faith effort to comply with the requirements set out in *Santosky*, but used language which the Commonwealth has now taken advantage of in order to justify the seizing of its citizens' children with absolutely no proof of neglect or abuse by clear and convincing evidence, or any evidence at all.

It is a construction of the statutory language which potentially has an adverse effect upon every parent and child in the Commonwealth.

2. The "independent review" mechanism provided for by the Kentucky Court of Appeals violates due process.

The Kentucky Court of Appeals correctly found that KRS 625.090(1)(A) was applied unconstitutionally by the trial court, but declined to go further and declare the statute violated the United States Constitution on its face. It then created the "independent review" mechanism which is found at pages 14-15 of its Opinion Reversing.

The Kentucky Supreme Court declined to address the constitutionality of this mechanism,

holding that the question was not properly before it - therefore apparently leaving in place the mechanism crafted by the Kentucky Court of Appeals.

The "independent review" mechanism was created by the Court of Appeals in an attempt to illustrate how the statute could be applied constitutionally. Petitioner submits that the scheme is, in practical terms, unworkable. Moreover, on legal grounds, it creates an exception to the hearsay rule of such a nature as to violate procedural due process.

The question raised by the "independent review" mechanism envisioned by the Court of Appeals is whether evidence received at a prior adjudication of dependency can be used by the trial court in a subsequent termination trial.

The Court of Appeals concluded that all evidence in the dependency adjudication may be introduced in the termination trial, and the trial court can conduct an "independent review " of whether the evidence supports a finding of dependency by clear and convincing evidence.

Petitioner submits that such evidence may be admissible in the subsequent termination trial, or it may not be. The determination must be made on a case-by-case basis, upon some finding that a hearsay exception applies. Otherwise, the out-of-court statements introduced in the dependency adjudication could be offered for their truth, on a wholesale basis, at the termination trial.

Such evidence will, in many cases, meet an exception to the hearsay rule and might then be

used as the Court of Appeals envisioned. That determination must, however, be made on a case-by-case basis with an exception found for each admission, rather than permitting the wholesale importation of evidence from one adjudication involving other issues and a different standard of evidentiary review into a subsequent termination trial.

The actual evidence of dependency must be proven in the termination trial itself, and that requirement cannot be circumvented by grafting evidence taken in a dependency proceeding onto the termination trial by certified copies of the record in the dependency case.

3. The trial court lacked "clear and convincing evidence."

The holding of the trial court is also erroneous because it was not based upon "clear and convincing evidence." The grounds upon which a finding of "abuse or neglect" may be based are set out in KRS 625.090(2). In determining whether one or more of the grounds exist, a trial court is required to consider six factors, which are set out in KRS 625.090(3).

In the present case, the family court determined that grounds existed under KRS 625.090(2)(e) and (g). In its review of the six factors, the family court found that the Cabinet rendered reasonable efforts to reunify the family. KRS 625.090(3)(c). Furthermore, the family court found that the Cabinet had met A.J.M.'s needs since

removal from T.G.'s custody and the prospects for improvement of A.J.M.'s welfare was greater if parental rights were terminated as her foster family wanted to adopt her. KRS 625.090(3)(e). Finally, the family court found that the Cabinet examined T.G.'s mental health. KRS 625.090(3)(a).

While there was testimony concerning T.G.'s mental illness, the statute provides that such mental illness must "render the parent consistently unable to care for the immediate and ongoing physical or psychological needs of the child for extended periods of time[.]" KRS 625.090(3)(a). However, the family court did not conclude or find that T.G.'s mental illness rendered her unable to consistently care for A.J.M.

In addition, psychologist Dr. Brenzel testified that T.G.'s diagnoses dramatically affect her ability to parent, but are manageable, and improvement is possible if she can form and maintain baseline relationships with the critical people in her life.

Mental health counselor Dr. Kinnetz noted the progress T.G. made during their 2004 sessions, but her mistrust and suspicions would not allow A.J.M. to be returned to her at that time. Neither of these witnesses testified that T.G.'s mental illness brought her within the scope of the statute.

As to reunification, the Cabinet did make efforts by providing parenting classes and therapy for T.G. However, T.G. completed what the Cabinet recommended, and much of what the Cabinet social worker Tange testified to took place prior to A.J.M.'s birth. Furthermore, the Cabinet did not offer in-home services to T.G. when social worker and

counselor Alison Johnson recommended these services for a successful reunification.

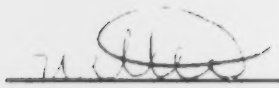
In sum, there was no substantial evidence that T.G. failed or was incapable of providing essential food, clothing, shelter or medical care. This was evident through the results of A.J.M.'s medical examination and testimony that she is above-average in both her intelligence and developmental levels. For this reason, the family court erred in finding otherwise.

Since there was no substantial evidence to support the family court's finding that A.J.M. was abused or neglected, or that a ground supporting termination exists, Petitioner submits that the family court clearly abused its discretion in terminating T.G.'s parental rights to A.J.M.

CONCLUSION

As shown above, the judgment of the court below was clearly erroneous and must be reversed. This Court, therefore, should grant certiorari to the Kentucky Supreme Court and, upon hearing, remand the action to the trial court with directions that the action be reinstated on the court's docket and that the Petitioner be granted a new trial. Petitioner prays for an Order of the Court so holding.

Respectfully submitted,



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APPENDIX

K.R.S. 625.090 Grounds for termination.

(1) The Circuit Court may involuntarily terminate all parental rights of a parent of a named child, if the Circuit Court finds from the pleadings and by clear and convincing evidence that:
(a) 1. The child has been adjudged to be an abused or neglected child, as defined in KRS 600.020(1), by a court of competent jurisdiction;
2. The child is found to be an abused or neglected child, as defined in KRS 600.020(1), by the Circuit Court in this proceeding; or
3. The parent has been convicted of a criminal charge relating to the physical or sexual abuse or neglect of any child and that physical or sexual abuse, neglect, or emotional injury to the child named in the present termination action is likely to occur if the parental rights are not terminated; and
(b) Termination would be in the best interest of the child.
(2) No termination of parental rights shall be ordered unless the Circuit Court also finds by clear and convincing evidence the existence of one (1) or more of the following grounds:
(a) That the parent has abandoned the child for a period of not less than ninety (90) days;
(b) That the parent has inflicted or allowed to be inflicted upon the child, by other than accidental means, serious physical injury;
(c) That the parent has continuously or repeatedly inflicted or allowed to be inflicted upon the child, by other than accidental means, physical injury or emotional harm;

(d) That the parent has been convicted of a felony that involved the infliction of serious physical injury to any child;

(e) That the parent, for a period of not less than six (6) months, has continuously or repeatedly failed or refused to provide or has been substantially incapable of providing essential parental care and protection for the child and that there is no reasonable expectation of improvement in parental care and protection, considering the age of the child;

(f) That the parent has caused or allowed the child to be sexually abused or exploited;

(g) That the parent, for reasons other than poverty alone, has continuously or repeatedly failed to provide or is incapable of providing essential food, clothing, shelter, medical care, or education reasonably necessary and available for the child's well-being and that there is no reasonable expectation of significant improvement in the parent's conduct in the immediately foreseeable future, considering the age of the child;

(h) That:

1. The parent's parental rights to another child have been involuntarily terminated;

2. The child named in the present termination action was born subsequent to or during the pendency of the previous termination; and

3. The conditions or factors which were the basis for the previous termination finding have not been corrected;

(i) That the parent has been convicted in a criminal proceeding of having caused or contributed to the death of another child as a result of physical or sexual abuse or neglect; or

(j) That the child has been in foster care under the responsibility of the cabinet for fifteen (15) of the most recent twenty-two (22) months preceding the filing of the petition to terminate parental rights.

(3) In determining the best interest of the child and the existence of a ground for termination, the Circuit Court shall consider the following factors:

(a) Mental illness as defined by KRS 202A.011(9), or mental retardation as defined by KRS 202B.010(9) of the parent as certified by a qualified mental health professional, which renders the parent consistently unable to care for the immediate and ongoing physical or psychological needs of the child for extended periods of time;

(b) Acts of abuse or neglect as defined in KRS 600.020(1) toward any child in the family;

(c) If the child has been placed with the cabinet, whether the cabinet has, prior to the filing of the petition made reasonable efforts as defined in KRS 620.020 to reunite the child with the parents unless one or more of the circumstances enumerated in KRS 610.127 for not requiring reasonable efforts have been substantiated in a written finding by the District Court;

(d) The efforts and adjustments the parent has made in his circumstances, conduct, or conditions to make it in the child's best interest to return him to his home within

a reasonable period of time, considering the age of the child;

(e) The physical, emotional, and mental health of the child and the prospects for the improvement of the child's welfare if termination is ordered; and

(f) The payment or the failure to pay a reasonable portion of substitute physical care and maintenance if financially able to do so.

(4) If the child has been placed with the cabinet, the parent may present testimony concerning the reunification services offered by the cabinet and whether additional services would be likely to bring about lasting parental adjustment enabling a return of the child to the parent.

(5) If the parent proves by a preponderance of the evidence that the child will not continue to be an abused or neglected child as defined in KRS 600.020(1) if returned to the parent the court in its discretion may determine not to terminate parental rights.

(6) Upon the conclusion of proof and argument of counsel, the Circuit Court shall enter findings of fact, conclusions of law, and a decision as to each parent-respondent within thirty (30) days either: Page 3 of 3

(a) Terminating the right of the parent; or
(b) Dismissing the petition and stating whether the child shall be returned to the parent or shall remain in the custody of the state.

CERTIFICATE OF COMPLIANCE WITH WORD COUNT LIMITATIONS

I, Theresa Gerstle, Petitioner and a *pro se* litigant, certify that the Petition for Rehearing filed in the above-entitled action contains 2,192 words, excluding the parts of the Petition that are exempted.

Dated: November 25, 2009

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CERTIFICATION OF COMPLIANCE
WITH SCR 44.2

I, Theresa Gerstle, Petitioner and a *pro se* litigant, certify that the Petition for Rehearing filed in the above-entitled action complies with the requirements of SCR 44.2, that it is limited to intervening circumstances of a substantial or controlling effect or to other substantial grounds not previously presented; that it is presented in good faith and not for delay.

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